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No. 06-740

IN THE

Supreme Court of the United States

YUMAN LOPEZ-CANCINOS, and
YOCARI CASTILLO DE LOPEZ,

Petitioners,

—v.—

ALBERTO R. GONZALES,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether REAL ID Act § 106(a)(1)(A)(iii)("Section 106"), codified at 8 U.S.C. §1252(a)(2)(D), which restored jurisdiction over "questions of law" in immigration cases notwithstanding specific jurisdictional bars, confers on the courts of appeals jurisdiction to review the proper interpretation of regulations and the application of law to undisputed facts where review of the underlying issue or form of relief is otherwise barred.

LIST OF PARTIES

Petitioners are Yuman Lopez-Cancinos and Yocari Selenita Castillo de Lopez, husband and wife.

Respondent is United States Attorney General Alberto Gonzales.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners is a corporation that has issued shares to the public nor is any a parent corporation, a subsidiary or an affiliate of corporations that have done so.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

LIST OF PARTIES..... ii

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF AUTHORITIES..... v

OPINIONS AND ORDERS BELOW..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT..... 14

This Case Raises Issues of National Significance Concerning the Right to Judicial Review in Immigration Cases..... 14

I. The Lack of Guidance Regarding the Meaning of the Term "Questions of Law" Has Resulted in Inconsistent Decisions Between And Within Circuits..... 16

II. The Overly Restrictive Interpretation of The Scope of Judicial Review by Some Courts, Such as That Applied in this Case, Violates the Suspension Clause and Contravenes the Clear Intent of Congress..... 18

A. Limiting the Interpretation of the Term "Questions of Law" to Issues of Statutory Interpretation Raises Suspension Clause Issues..... 19

B. The Text and History of 8 U.S.C. §1252(a)(2)(D) Establish that "Questions of Law" Encompass More Than Issues of Statutory Construction..... 20

C. The Ruling Below Deprived Petitioners of Their Constitutional And Statutory Right to Judicial Review of the Orders in Their Immigration Case..... 22

CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES:

INS v. Cardoza-Fonseca, 480 U.S.421 (1987).....23

Hamdan v. Gonzales, 425 F.3d 1051,
(7th Cir. 2005).....16

Hernandez v. Ashcroft, 345 F.3d 824
(9th Cir. 2003).....16, 17

Higuit v. Gonzales, 433, F.3d 417, (4th Cir.)
cert. denied, ___ U.S. ____, 126 S. Ct. 2973
(2006).....16

Kamara v. Attorney General, 420 F.3d 202
(3rd Cir.2005)..... 17, 20

Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005)..... 23

Perales-Cumpean v. Gonzales, 425 F.3d 977,
(10th Cir.2005).....16

Ramadan v. Gonzales, 427 F.3d 1218
(9th Cir.2005) *pet. for reh'g granted,*
No. 08-74351 (9th Cir. 2006)..... 16, 17, 18, 20, 22

Reyes-Vasquez v. Ashcroft, 395 F.3d 905,
(8th Cir. 2005).....17

Singh v. Ashcroft, 351 F. 3d 435 (9th Cir. 2003).....19

St. Cyr v. INS, 533 U.S.289 (2001).....13, 15, 19, 20, 21

United States ex rel. Accardi v. Shaughnessy,
347 U.S.260 (1954).....19

Wang v. Ashcroft, 320 F.3d 130 (2nd Cir. 2003)..... 19

Wilmore v. Gonzales, 455 F.3d 524,
(5th Cir. 2006)..... 16

Xiao Ji Chen v. U.S. Department of Justice, 434 F.3d
144 (2d Cir. 2006) *pet for reh'g filed,* No.
02-4631 (2d Cir. Feb. 20, 2006).....18, 19

Zhang v. Gonzales, 457 F.3d 172 (2d Cir. 2006).....16

CONSTITUTIONAL PROVISIONS:

U.S. Const., amend. 5.....*passim*

U.S. Const., Art. 1, §9 (Suspension Clause).....*passim*

STATUTES:

Antiterrorism and Effective Death Penalty Act
(AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996)...15, 21

Foreign Affairs Reform and Restructuring Act of 1998
(Pub. L. 105-288, Div. G. 112 Stat.2681 (1998), §2242.....4

Illegal Immigration Reform and Immigrant
Responsibility Act (IIRAIRA), Pub. L. No. 104-208,
110 Stat. 3009-549 (1996).....15, 21

REAL ID Act, Pub. L. No. 109-13, Div. B., 119 Stat.
231 (May 11, 2005)..... 2, 3, 13, 14, 15, 17, 18, 19, 20, 21, 22

8 U.S.C. §1101.....14

8 U.S.C. §1101(f).....2, 12

8 U.S.C. §1101(f)(6).....11

8 U.S.C. §1158(a).....4

8 U.S.C. §1158(a)(1).....2

8 U.S.C. §1158 (a)(2)(B).....2, 3

8 U.S.C. §1158 (a)(2)(D).....2, 10, 17

8 U.S.C. §1158(a)(3).....2, 13

8 U.S.C. §1158(b)(3)(A).....3

8 U.S.C. §1158(d)(6).....11

8 U.S.C. §1182(a)(6)(a)(i).....4

8 U.S.C. §1229c(b).....2,3, 4, 12, 23

8 U.S.C. §1229c(f).....2, 3

8 U.S.C. §1231(b)(3).....11

8 U.S.C. §1231(b)(3)(A).....4

8 U.S.C. §1252(a)(2).....15

8 U.S.C. §1252(a)(2)(D)..... 2, 20, 21, 23

8 U.S.C. §1252(D).....15

8 U.S.C. §1255.....16

28 U.S.C. §1254(1).....1

FEDERAL REGULATIONS:

8 C.F.R. §208.4(a)(5)..... 2, 10

8 C.F.R. §208.4(a)(5)(i).....11, 22

RULES:

Supreme Court Rule 10.....23

OTHER AUTHORITIES:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 2987, G.A. Res. 39/46, 39 U.N. GOAR Supp. (No. 510 197, U.N. Doc A/Res/39/708 (1984).....4, 11, 12

Leiderman, Aaron G., Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the Real ID Act, 106, Colum L. Rev. 1367, 1389 (Oct. 2006) 17

Neuman, Gerald L., The REAL ID Act & the Suspension Clause, 10-20 Bender's Immigr. Bull. 1, 10-18 (2005) 19

REAL ID Act Joint Conference Report,
H.R. Rep. No. 109-72 (2005),
151 Cong. Rec. H2813, H2873.....15, 21, 22

OPINIONS AND ORDERS BELOW

The original decision of the Immigration Judge, dated July 12, 2002, is set forth in two separate opinions (App. 16a-33a and App. 34a-55a). The Board of Immigration Appeals ("BIA") affirmed the denial of asylum and grant of voluntary departure to Yocari Castillo de Lopez, and also affirmed the denials of asylum, withholding of removal, relief under the Convention Against Torture, and voluntary departure to her husband, Yuman Lopez-Cancinos, on February 28, 2005 (App. 6a-15a). The U.S. District Court for the District of Arizona transferred a habeas corpus petition challenging aspects of the ruling against Mr. Lopez-Cancinos on September 16, 2005 (App. 4a-5a). The case was redesignated a petition for review and consolidated with a timely filed petition for review at the Ninth Circuit. The Ninth Circuit panel decisions denying the consolidated petitions for review (App. 2a-3a) and denying a petition for panel rehearing and a suggestion for rehearing *en banc* (App. 1a) are unreported.

JURISDICTION

The Ninth Circuit's denial of the consolidated petitions for review occurred on June 2, 2006. On August 25, 2006, the panel issued the order denying the petition for rehearing. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part, that "No person shall be [...] deprived of life, liberty, or property, without due process of law [.]." U.S. Const. amend. 5.

The Suspension Clause of the United States Constitution reads as follows: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases

of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. 1, §9.

The definition of "good moral character, at 8 U.S.C. §1101(f), is set out in the Appendix to the petition (App. 56a).

Provisions regarding voluntary departure, 8 U.S.C. §1229c(b) and the lack of judicial review of denials of voluntary departure, 8 U.S.C. §1229c(f) are set out in full in the Appendix (App. 56a).

Statutes governing asylum, at 8 U.S.C. §1158(a)(1), the one-year filing deadline for asylum at 8 U.S.C. §1158(a)(2)(B), the exception to the deadline based on changed or extraordinary circumstances relating to the filing delay at 8 U.S.C. §1158(a)(2)(D), and withholding of removal at 8 U.S.C. §1231(b)(3), are set forth fully at App. 57a. The limitation on judicial review of determinations regarding exceptions to asylum eligibility at 8 U.S.C. §1158(a)(3) is set out in full at App. 58a.

Finally, regulations relating to the asylum filing deadline based on changed or extraordinary circumstances, 8 C.F.R. §208.4(a)(5), are set out at App. 58-59a.

STATEMENT OF THE CASE

This case raises important, recurring questions regarding the jurisdiction of federal courts to review various issues arising in immigration cases in light of the REAL ID Act, Pub. L. No. 109-13, Div. B., 119 Stat. 231 (May 11, 2005). One issue is whether the REAL ID Act's clarification that courts of appeals have jurisdiction to review "questions of law," *see* REAL ID Act §106(a)(1)(A)(iii), codified at 8 U.S.C. §1252(a)(2)(D) (App. 58a), encompasses claims regarding the proper application of regulations to a set of facts. Here, the court below found no jurisdiction to review an asylum applicant's claim that the Board of Immigration Appeals ("the

Board") should have applied to his case a regulation providing that mental disability may qualify an applicant for one of two statutory exceptions to the one-year-from-arrival filing deadline.

Another issue is whether "questions of law" includes the application of law to undisputed facts. The Ninth Circuit panel found that it lacked jurisdiction to review the question of whether a lie told to avoid the erroneous denial of relief constitutes a lie "for the purpose of obtaining" an immigration benefit," where Board had found that the lie did not to go to the heart of the asylum claim. This issue arises in the context of determining whether an individual qualifies for a discretionary grant of voluntary departure under 8 U.S.C. §1229c(b), the denial of which is unreviewable under 8 U.S.C. §1229c(f) – subject to the REAL ID Act's provision for the review of "questions of law" provision.

Proceedings Before the INS and Immigration Judge

This case involves the claims for political asylum, related forms of relief, and voluntary departure by a young man and woman, each of whom had independently fled Guatemala as a teenager, arriving in the U.S. in 1997. Upon arrival, the young woman, now Yocari Castillo de Lopez, immediately notified the Immigration and Naturalization ("INS") of her presence in this country by filing forms rendering her a derivative on the pending asylum application of her father. In late November of 1999, the couple married, terminating the wife's status as a derivative on her father's claim. In early September of 2000, they both filed asylum applications (CAR 683, 1307, 1642), each listing the other as a derivative (*id.*, CAR 702, 705, 1209)[1].

[1] Under 8 U.S.C. §1158(b)(3)(A), the spouse of an asylee may be granted asylee status.

The INS interviewed only the husband, determined that he had failed to comply with the one-year-from-arrival filing deadline at 8 U.S.C. §1158(a)(2)(B), and referred his application to the Immigration Judge (CAR 1307). The INS commenced removal proceedings against both applicants on November 14,2000, charging them with being present without admission, in violation of 8 U.S.C. §1182(a)(6)(a)(i) (CAR 1259, 1715).

The IJ held hearings regarding the husband's and wife's claims on November 29, 2001 and April 30, 2002, respectively. (CAR 232-343, 347-436). Each applied for asylum under 8 U.S.C. §1158(a) and, in the alternative, voluntary departure under 8 U.S.C. §1229c(b) (CAR 229, 347-48). Mr. Lopez-Cancinos also applied for withholding of removal under 8 U.S.C. §1231(b)(3)(A) and under the Convention Against Torture ("CAT").[2]

Mr. Lopez-Cancinos' underlying claims

Mr. Lopez-Cancinos' applications for protection rests on a claim that he was persecuted by members of the military and would again face danger in Guatemala as an indigenous person who deserted the military and is suspected of harboring subversive views. Ms. Castillo de Lopez' asylum application is based on the claim that, as the indigenous daughter of one military deserter and the wife of another, and one returning to Guatemala after a decade, she, too, would face danger as a suspected subversive and as a family member of deserters. Reversing the IJ's adverse credibility determination against Mr.

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[2] The full citation is Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, G.A. Res. 39/46, 39 U.N. GOAR Supp. (No. 51) 197, U.N. Doc A/Res/39/708 (1984). The U.S. implemented Article 3 of the CAT, the withholding provision, under §2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Div. G, 112 Stat. 2681 (CAR 683, 1148, 1175-78).

Lopez-Cancinos, the Board would later find both applicants credible (App. 8a-9a, 13a).

Through testimony and written documentation, Mr. Lopez-Cancinos established that he grew up in a highly conflictive zone where the army suspected that many indigenous men, including his father, were guerrillas (CAR 299-305, 1207-08). At the age of 17 or 18, Mr. Lopez Cancinos and other indigenous youth from his area who had ignored orders to report for military duty were rounded up by soldiers, denounced as subversives, savagely beaten, and forced to report daily for training exercises at the military base (CAR 305, 1208). The soldiers told them that failure to report would confirm one's status as a guerrilla, resulting in torture and death *Id.* At the base, Mr. Lopez-Cancinos was forced to watch up close as the soldiers slowly tortured another suspected subversive to death (CAR 305-06, 1209). After two weeks, when he slipped during an exercise, Mr. Lopez-Cancinos was dragged around the base by his hair, kicked with steel-toed boots, and beaten to the point of spitting up blood (CAR 307-08, 1209). When Mr. Lopez-Cancinos failed to report to the base the day after the incident, soldiers went looking for him and told his mother that his failure to return would confirm his status as a subversive, and that he would therefore be killed (CAR 308, 1209).

With his mother's help, Mr. Lopez-Cancinos fled to Mexico (CAR 312). When his brother and parents joined him, he discovered that when his father had returned to the village to look for him, the soldiers had encountered the father and tortured him (CAR 313, 1210). They beat and kicked him, broke his arm, and pulled out his teeth and fingernails (*id.*). They threatened to kill his deserter son if ever they found him. (*id.*). Although the father survived that incident, he returned to Guatemala to try to quickly sell the family's property and was never heard from again (CAR 314).

Mr. Lopez-Cancinos soon joined a sister and her husband in California (CAR 315-16, 1210). There, memories of his experiences haunted him to such an extent that he remained in the house, and his sister bought him medication to calm his nerves (CAR 737-38). She thought she also retained a lawyer to help him file for asylum in mid-1997, and Mr. Lopez-Cancinos thought he had filed for asylum, but the "lawyer" disappeared (CAR 319-322, 691, 737-38).

After about two years, Mr. Lopez-Cancinos learned that a girl from his home area whom he had courted briefly, Yocari, was living in Arizona (CAR 323). The couple reunited and married in late November of 1999 (CAR 323, 685, 1313). In March of 2000, she took him to see her lawyer, who filed a Freedom of Information Act ("FOIA") Request regarding the application Mr. Lopez-Cancinos thought he had filed (CAR 729). In June 2000, the FOIA request revealed that he had no application on file (*id.*). On September 7, 2000, the couple filed their asylum applications with the INS (CAR 729, 1307).

The couple presented to the IJ 34 pages of live testimony and 53 pages of exhibits establishing that Mr. Lopez-Cancinos suffered from Post Traumatic Stress Disorder, and that the symptoms – including nightmares of cadavers and being chased, flashbacks of dead bodies, enhanced startle response, intrusive thoughts, fear, avoidance of others, difficulty sleeping, memory loss and depression – were ongoing as of the hearing dates (CAR 306-307, 312, 316-17, 322-23, 293-94, 414-15, 233-55, 466-516, 737, 1211). The witnesses on this issue were both petitioners, Mr. Lopez-Cancinos' sister, and a mental health expert (*See id.*).

After the November 2001 hearing and prior to the IJ's decision, Mr. Lopez-Cancinos filed an affidavit admitting that he had lied regarding the issue of how he had obtained his Guatemalan identity card (CAR 452-54). Although he had testified that he obtained it in the U.S. via proxy, he admitted that he had returned to Guatemala to obtain it because he was

told by the California "lawyer" that he needed it to file for asylum (CAR 425). He said he lied because he was "certain no one from the U.S. would believe that, if I was afraid, I would return to my country to get my [identity document]" (CAR 453).

Ms. Castillo de Lopez' underlying claims

Like Mr. Lopez-Cancinos, Ms. Castillo de Lopez' father had been forced to serve in the Guatemalan army, had deserted, and had fled to the U.S. (CAR 369, 1288-89). Thereafter, the army had ransacked the family's small house in a remote village, killing the dog and destroying the children's toys (CAR 409). Questions from strangers regarding her father's whereabouts caused her mother to abandon the house and divide her three children between her own parents' house and the home of her husband's parents, where she sent her daughter, Yocari (Ms. Castillos De Lopez) (CAR 370-71, 1289). Yocari's grandfather's status as a former military commissioner, the mother felt, put him in a better postion to protect her (CAR 371, 418).

In approximately 1990 or 1991, the family began receiving anonymous letters at both houses threatening to kidnap the children if the mother did not reveal her husband's whereabouts (CAR 373, 1289, 1501). Yocari was specifically mentioned by name, and her grandparents limited her movements (CAR 410).

In 1993 or 1994, the mother tried to flee Guatemala with her children, but the family was intercepted and sent back by Mexican officials (CAR 373, 1290). The mother managed to make it to the U.S. on her own in 1994, and by 1996, the parents had scraped together enough money to send for their three children (*id.*). By then, Yocari was 15.

Yocari's father was beset by mental illness not long after her arrival in the U.S. He began hearing voices and grew

violent. Eventually, he disappeared, and in 2001, her mother discovered that he was back with his parents in Guatemala, who feared for his safety. The mother heard that his brother-in-law managed to get him safely to Mexico.

Evidence Relating to Both Claims

Yocari's mother testified that she knows of many deserters, as well as family members of deserters, who were killed by the military. Yocari also testified about two recent murders in the couple's home village, which she had learned of from an aunt. One was that of the widow of a former companion of her father, who himself had been murdered upon his return to Guatemala. His widow was believed to have been killed by the same people who killed her husband (CAR 419-20, 1566).

The applicants presented both the oral and written testimony of Professor Linda Buckley Green, an expert specializing in structural violence in Central America, the role of the military in rural Guatemala, and the impact of the Guatemalan military on day-to-day life (CAR 258-263, 526-536). Dr. Green testified that Guatemala is ruled by people with ties to the military (CAR 272-75), that the military's dominance filters down to the local level through cronyism and the distribution of funds to former civil patrolmen and former military commissioners (*id.*), and that the 1996 peace accord between the government and guerrilla forces failed in its stated attempt to extract the military from domestic affairs (CAR 276.). Moreover, she testified that, due to a combination of dire economic and human rights conditions, the situation is "horrific," (CAR 522) and "[d]eterioaring rapidly" (CAR 271).

Dr. Green further testified that because villagers killed their neighbors during the war and were never punished, old animosities and suspicions continue to fester (CAR 273), with ex-military members threatening those in the community with whom they have had conflicts in the past. She added,

"Lawlessless and extrajudicial punishment are commonplace, and are often believed to take place at the hands of the government or military-related officials." (CAR 1625).

Given this situation, she testified that there is a strong chance that Mr. Lopez-Cancinos would be persecuted by ex-military members who remain in his community "because of his suspected anti-military associations and the manner in which his desertion may have personally rankled local authority figures." (CAR 523).

Regarding Yocari's risk, Dr. Green testified that "there is a reasonable possibility she would be imputed with her father's and her husband's anti-military opinions," that her long absence from the country would increase the risk that she would be suspected of guerrilla sympathies, and that, upon learning of the two recent murders in the couple's home village, her assessment of Yocari's risk had increased to between 20 and 30 percent (up from an earlier estimate of 20 percent) (CAR 298, 397-99, 1563-66, 1626).

A 2001 State Department ("DOS") report covering country conditions in the year 2000 found general respect for human rights by the government as well as ongoing human rights abuses, particularly by local police and municipal leaders (CAR 556-57, 569). However, it stated there were no allegations of politically motivated killings by government agents[.] (CAR 557). A 2002 DOS report for the year 2001 reported worsening conditions in terms of violations of the spirit of the peace accords (CAR 1482); remilitarization of the country (CAR 1483); involvement of security forces in human rights abuses, including extrajudicial killings (CAR 1485); obstruction of justice at high levels; increased signs of participation of clandestine armed groups in illegal activities linked to officials; and plausible allegations of politically motivated killings by nonstate actors, with limited willingness of the state to investigate (CAR 1484). The report further noted a trend toward remilitarization in Guatemala (CAR 1482).

Other articles and reports in the record released in late 2001 and early 2002 likewise indicated an overall deterioration in human rights in Guatemala and a decline in the rule of law. Several U.S. Senators warned of "a potentially 'tragic' backtracking from the progress achieved" since the 1996 peace accords (CAR 634). A report by the United Nations Verification Mission in Guatemala documented a failure of state protection and widespread impunity for human rights violations (CAR 1446), a dysfunctional judicial system (CAR 1440), *pro forma* or nonexistent investigations into most of an increasing number of lynchings (CAR 1443) and an "inherited pattern of impunity [that] is becoming a systematic, cross-cutting phenomenon[.]" (CAR 1446). National Public Radio reported in April of 2002, "Over the last several months, the climate has grown increasingly unstable, prompting fears that the country could sink back into conflict." (CAR 1554).

The IJ and BIA Decisions

On July 12, 2002, the IJ issued separate written decisions denying all forms of relief requested except Ms. Castillo de Lopez' application for voluntary departure (App. 16a-55a). After summarizing the testimony of the four witnesses at the 2001 hearing, the IJ found that Mr. Lopez-Cancinos was not credible because his description of persecution seemed "too horrible and macabre to be true," (App. 27a) and because the lie he had admitted to telling cast doubt on the remainder of his testimony (*id.*). The IJ rejected Mr. Lopez-Cancinos' claim that he qualified for an exception to the asylum filing deadline based on "extraordinary circumstances relating to the delay in filing," *see* 8 U.S.C. §1158(a)(2)(D), finding that even if the hiring of a shyster were such a circumstance, he purposely failed to take action for over two years, thus failing to file within a reasonable time of the circumstance, as required by 8 C.F.R. §208.4(a)(5) (App. 29a). The IJ did not address Mr. Lopez-Cancinos' claim that his mental health condition constituted an "extraordinary circumstance" for purposes of the filing deadline exception.

The IJ found that the lack of credibility doomed Mr. Lopez-Cancinos' claims for asylum, withholding of removal, and protection under the CAT, and that he had admitted to giving false testimony for a benefit under the Immigration Act, therefore barring him from eligibility for voluntary departure in that it barred him from establishing good moral character under 8 U.S.C. § 1101(f)(6) (App. 32a). The IJ also deemed Mr. Lopez-Cancinos' application "frivolous," (App. 33a.), a finding that bars a person from ever receiving immigration benefits, 8 U.S.C. § 1158(d)(6).

The IJ found that Ms. Castillo de Lopez' asylum application was not time barred because she filed it within a reasonable period of her loss of status as a derivative on her father's application (App. 45a). However, he found that he was not "compelled [...] to conclude" that she had a well-founded fear of persecution because, in part, she was never threatened with death and presented no evidence of similarly situated persons who were threatened, harmed, or killed (App. 50a). He also stated that "nearly all" of her family remained in Guatemala and that her father was able to return there and live safely (*id.*).

The Board reversed both the IJ's adverse credibility finding against Mr. Lopez-Cancinos and the finding that his asylum application was frivolous (App. 9a-10a). It found that the lie he had told was immaterial to his claim for asylum. (*id.*). However, the Board found him ineligible for the "extraordinary circumstances" exception to the asylum filing deadline because, like the IJ, it found that he "waited 2 years after discovering the fraud" of the purported lawyer (App. 7a-8a). Like the IJ, the Board did not address Mr. Lopez-Cancinos' argument that, under 8 C.F.R. §208.4(a)(5)(i), his mental disability constituted an alternative basis for establishing "extraordinary circumstances" justifying the delay.

Regarding the application for withholding of removal under 8 U.S.C. § 1231(b)(3), for which there is no filing

deadline, the Board found that the mistreatment Mr. Lopez-Cancinos underwent was not severe enough to constitute persecution (App. 11a), but that even had it found past persecution, it would have found the resulting regulatory presumption of a future threat to his life or freedom to have been rebutted by the DOS report covering the year 2000 (App. 11a-12a). The Board stated that the report not only showed that the government generally respects human rights, and that there "'were no allegations of politically motivated killings by government agents in 2000,'" but that it gave no indication that former guerrillas or army deserters were being targeted for persecution (App. 12a, quoting DOS report). The Board therefore rejected Dr. Green's conclusion that Mr. Lopez-Cancinos would be at risk of persecution by ex-military members remaining in his community (App. 12a). The Board made no reference to any other documents in the record regarding country conditions (*see id.*). Based on this assessment of conditions, the Board likewise denied Mr. Lopez-Cancinos' CAT claim.

The Board affirmed, without analysis, the IJ's determination that Mr. Lopez-Cancinos' false testimony rendered him statutorily barred from establishing good moral character under 8 U.S.C. §1101(f), and therefore ineligible for voluntary departure under 8 U.S.C. §1229c(b) (App. 12a).

The Board also affirmed the denial of Ms. Castillo de Lopez' asylum claim "for the reasons outlined in the Immigration Judge's written decision." (App. 13a-14a). The Board did not address Petitioners' claims, in their brief, that the IJ's opinion regarding her claim was "riddled with factual and legal errors," (CAR 92), including an erroneously high burden of proof; misconstruction of the expert's testimony[3]; the conclusion that Mr. Lopez-Cancinos was never threatened with

[3] The IJ thought the expert had increased her assessment of the risk based on a review of Mr. Lopez-Cancinos' affidavit (App. 41a) rather than based on reports of the recent murders in the couple's home village (*See* CAR 397-99, 1563-665).

harm; the finding that she presented no evidence of harm befalling similarly situated individuals; and the finding that all her family remained in Guatemala whereas, in fact, all had fled (CAR 92-99). Citing the 2001 DOS Report, the Board emphasized that the evidence did not indicate that close relatives of suspected guerrillas and deserters would still face persecution (App. 14a).

The Ninth Circuit Decisions

In their briefs to the Ninth Circuit, the petitioners argued, *inter alia*, that the court had jurisdiction to consider the Board's failure to apply, in Mr. Lopez-Cancinos' case, the regulation regarding the mental health exception to the filing deadline (Petitioners' Opening Brief ["Opening Brief"], pp. 30-31; Petitioners' Reply Brief ["Reply Brief"], p. 4).[4] Likewise, they argued that the court had jurisdiction to review the legal issue of his statutory eligibility for voluntary departure (Reply Brief, pp. 31-32). In addition, regarding each applicant's asylum claim and Mr. Lopez-Cancinos' claims for withholding of removal, they argued that the Board erred in failing to consider any of the country conditions evidence other than the DOS report for the year 2000, including all evidence of a substantial deterioration in human rights beginning in 2001 (Opening Brief, pp. 39-45; Reply Brief, pp. 10-14).

Regarding Ms. Castillo de Lopez' claim, they also argued that the Board's decision was not entitled to deference because it adopted the IJ's erroneous factual and legal errors (Opening Brief, pp. 50-56).

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[4] They also argued that because the jurisdiction-stripping provision relating to the asylum bar, 8 U.S.C.§1158(a)(3), employs the same language that this court found, in *St. Cyr v. INS*, 533 U.S. 289 (2001), not to bar habeas review ("No court shall have jurisdiction to review [...]"), and because Mr. Lopez-Cancinos sought habeas review of the denial of asylum prior to enactment of the REAL ID Act, the circuit court retained jurisdiction to review his challenge to the denial of his asylum claim (Opening Brief, pp. 28-29, n. 14).

In a Memorandum decision dated June 2, 2006, a panel of the Ninth Circuit denied the couple's petition for review (App. 2a-3a). The court found that it lacked jurisdiction to review the denials of Mr. Lopez-Cancinos' claims for asylum and voluntary departure "because the petition for review raises no cognizable constitutional claims or questions of law." (App. 3a) (citation omitted). The panel rejected the remaining claims, finding that the standard of review required it to defer to the Board's findings regarding country conditions (*See id.*). On August 25, 2006, the court summarily denied the petition for rehearing (App. 1a).

Petitioners now seek *certiorari* in this Court.

REASONS FOR GRANTING THE WRIT

Since 1996, jurisdictional provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., have left courts grappling with questions regarding the scope of their jurisdiction – with inconsistent results. More recently, since the passage of the REAL ID Act of 2005, courts have struggled to define the term "questions of law," and, as in this case, have sometimes erroneously failed to recognize the legal component of certain types of determinations. This situation calls for guidance by this Court not only to ensure uniformity, but also to avoid violations of the Suspension Clause, as occurred below. Because of the numerous types of cases and the precious nature of the right involved, this case raises issues of national importance.

This Case Raises Issues of National Significance Concerning the Right to Judicial Review in Immigration Cases.

At stake here is the right to a judicial forum for review of immigration decisions. The Court last addressed this issue in the wake of changes to the statutory scheme of review brought about by the Antiterrorism and Effective Death Penalty Act

(AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-549 (1996). The former barred review of the final deportation orders of non-citizens with certain criminal convictions and the latter expanded these provisions to cover a broader range of criminal convictions as well as to preclude review of many types of discretionary determinations. *See* 8 U.S.C. §1252(a)(2). Addressing the impact of these changes in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court engaged in a lengthy historical analysis of habeas corpus and concluded that the Suspension Clause requires review of deportation orders. *See St. Cyr.*, 533 U.S. at 300. Without attempting to list the specific types of questions over which the Suspension Clause requires the availability of judicial review, the Court concluded that eliminating review of legal claims would trigger "serious constitutional questions." *Id.* at 314. The Court noted, however, that Suspension Clause issues would not be implicated if Congress were to provide an adequate alternate mechanism to habeas corpus for judicial review. *Id.* at 305. This is precisely what members of Congress stated they did when enacting the judicial review provisions of the REAL ID Act, which funneled review of all final orders of removal directly to the courts of appeals by means of petitions for review. H.R. Rep. No. 109-72, 151 Cong. Rec. H2813, H2873 (2005) (Conf. Rep.). *See* REAL ID Act, div. B., §106(a). As amended by Section 106(a), the INA now provides that nothing in the provisions precluding review of denials of discretionary relief or of removal orders against noncitizens for certain criminal offenses "or in any other provision of this Act" limiting review shall be deemed to preclude review "of constitutional claims or questions of law [...]." 8 U.S.C. §1252(D). As this and other cases illustrate, however, problems have arisen in the interpretation of "questions of law," with the result that narrow interpretations, such as the one the panel employed here, have deprived many noncitizens of their constitutionally guaranteed right to judicial review.

I. The Lack of Guidance Regarding the Meaning of the Term "Questions of Law" Has Resulted in Inconsistent Decisions Between and Within Circuits.

Conflicting determinations regarding what constitutes an issue of law abound, with some courts viewing as primarily factual or discretionary, and thus unreviewable, issues which other courts view as legal. The Ninth Circuit has found the determination of whether a noncitizen suffered "extreme cruelty" so as to qualify her for suspension of deportation, to be a legal determination, *Hernandez v. Ashcroft*, 345 F. 3d 824 (9th Cir. 2003), whereas the Tenth and Fifth Circuits have found the determination to require a judgment call as to the nature of the abuse. *Wilmore v. Gonzales*, 455 F. 3d 524, 528 (5th Cir. 2006) (no jurisdiction); *Perales-Cumpean v. Gonzales*, 429 F. 3d 977, 982 (10th Cir. 2005) (same). While the 7th Circuit found that it had jurisdiction to review a discretionary decision denying adjustment of status under 8 U.S.C. §1255, *Hamdan v. Gonzales*, 425 F. 3d 1051, 1058 (7th Cir. 2005) (reviewing claim that *res judicata* precluded IJ's characterization of asylum claim as frivolous as basis for discretionary denial), the Fourth Circuit found it lacked jurisdiction to review a challenge to such a determination, *Higuit v. Gonzales*, 433 F. 3d 417, 420 (4th Cir.) (no jurisdiction to address petitioner's claim that IJ misapplied bar for asylum and withholding in issuing discretionary denial), *cert. denied*, ___ U.S. ___, 126 S. Ct. 2973 (2006). *See also, Zhang v. Gonzales*, 457 F. 3d 172 (2d Cir. 2006) (Calebresi, J., concurring) (disagreeing that determination of whether facts establish "extreme hardship" is discretionary and unreviewable, but concurring based on circuit precedent).

As this case illustrates, the logic of the circuit courts in resolving these questions is also internally inconsistent. In the case at bar, the panel relied on *Ramadan v. Gonzales*, 427 F. 3d 1218 (9th Cir. 2005), *pet. for reh'g granted*, No. 03-74351 (9th Cir. 2006), to find that it lacked jurisdiction to review the

Board's determinations that Mr. Lopez-Cancinos did not qualify for voluntary departure and that he failed to demonstrate the existence of extraordinary circumstances relating to the delay in filing. 8 U.S.C. §1158(a)(2)(D).[5] (App. 3a). In *Ramadan*, the court found the determination of "the existence of changed circumstances which materially affect" one's claim, by its nature, to be predominantly factual, and it therefore held that it lacked jurisdiction to review it. *Id.* at 1221-1222. Yet, like the issue of whether abuse amounts to "extreme cruelty," which the Ninth Circuit held to be reviewable, *see Hernandez v. Ashcroft, supra*, "when the facts underlying a noncitizen's appeal are uncontested but at issue is whether those facts amount to 'changed' or 'extraordinary' circumstances, the noncitizen's appeal arguably presents a mixed question of fact and law which might be properly characterized as a 'legal' question." *See* Aaron G. Leiderman., Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the Real ID Act, 106, Colum L. Rev. 1367, 1389 (Oct. 2006). *See also, Kamara v. Attorney General,* 420 F. 3d 202, 211 (3rd Cir. 2005) (the scope of post REAL ID Act-review extends to "issues of application of law to fact, where the facts are undisputed and not the subject of challenge" (citation omitted); *Reyes-Vasquez v. Ashcroft*, 395 F. 3d 905, 906 (8th Cir. 2005) (with respect to discretionary determinations, "we may consider the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility to be considered for relief."). Such inconsistencies appears to stem from the lack of a coherent, consistent definition of the term, "questions of law." *See generally,* Leiderman, Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the Real ID Act, *supra.*

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[5] The order granting rehearing in *Ramadan* was in evidence before the panel below when it denied rehearing. Petition for Panel Rehearing and Petition for Rehearing En Banc, Exhibit A.

II. The Overly Restrictive Interpretation of the Scope of Judicial Review By Some Courts, Such as That Applied in This Case, Violates the Suspension Clause and Contravenes the Clear Intent of Congress.[6]

Recent pronouncements indicating that the term "questions of law" must be narrowly interpreted clearly go too far. In the case relied on below, *Ramadan*, *supra*, the Ninth Circuit stated:

> Should there be any doubt about the meaning of the term "questions of law" in the REAL ID Act, the legislative history makes it abundantly clear this term refers to a narrow category of issues regarding statutory construction."

Id., at 1222. The Second Circuit, likewise addressing a claim by an asylum applicant that she qualified for an exception to the filing deadline, also found the term "questions of law" to be limited to questions of statutory construction. *Xiao Ji Chen v. U.S. Department of Justice*, 434 F. 3d 144 (2d Cir. 2006), *pet for reh'g filed*, No. 02-4631 (2d Cir. Feb. 20, 2006). The Second Circuit reviewed the legislative history and cited *Ramadan* with approval. *Id.* at 152-53. Yet, as the history of habeas corpus review and a complete review of the legislative history of the REAL ID Act both indicate, this restrictive view of the authority of the courts is unwarranted.

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[6] The undersigned gratefully acknowledges the work of American Civil Liberties Union attorneys Lucas Guttentag, Jennifer Chang, Lee Gelernt, and Omar C. Jadwat, as well as American Law Foundation attorney Mary Kenney; portions of their briefs in support of rehearing in the *Ramadan* and *Xiao Ji Chen* cases are used in this section of the argument verbatim. None of them has reviewed the present petition nor is responsible for any errors contained herein.

A. Limiting the Interpretation of the Term "Questions of Law" to Issues of Statutory Interpretation Raises Suspension Clause Issues.

This Court's historical analysis of habeas review makes clear that the scope of review embraced in *Ramadan* and *Chen* is too narrow. As discussed above, this Court concluded, based on a lengthy historical analysis of the scope of habeas corpus, that the Suspension Clause "required" review of deportation orders. See *St. Cyr,* 533 U.S. at 300 (citation and punctuation omitted). The Court explained that habeas review in the executive detention context encompassed not only claims regarding the proper interpretation of statutes, but also claims regarding the "application" of statutes. *Id.,* 533 U.S. at 302. Moreover, the Court left no doubt that habeas review also covered questions concerning *regulations.* Indeed, one of the habeas cases on which the Court relied most heavily – *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954) – involved a claim under a regulation, not a statute. *See St. Cyr,* 533 U.S. at 307 (citing *Accardi).* Thus, as *St. Cyr* explains, habeas review has historically encompassed constitutional claims as well as all non-constitutional legal claims regarding the proper interpretation and application of the law. *See also,* Gerald L. Neuman, The REAL ID Act & the Suspension Clause, 10-20 Bender's Immigr. Bull. 1, 10-18 (2005) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over "application" questions and those involving regulations).[7]

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[7] In fact, apparently at odds with their more recent rulings, both the Ninth and Second Circuits recognized this fact prior to the REAL ID Act. *See Wang v. Ashcroft,* 320 F. 3d 130 (2d Cir. 2003) (finding habeas jurisdiction where criminal alien applying for CAT relief argued that the IJ had misapplied the regulations in finding he had not established that it was "more likely than not" that he would be tortured), and *Singh v. Ashcroft,* 351 F. 3d 435 (9th Cir. 2003) ("adopt[ing] the Second Circuit's well-reasoned analysis" in *Wang,* and rejecting the government's

Significantly, the Third Circuit has recognized that the REAL ID Act preserves review over claims that were previously cognizable in habeas, including the application of law to fact. *Kamara v. Attorney General*, 420 F. 3d 202, 209-11, 213-15 (3d Cir. 2005). The court stated that: "examining each of [petitioner]'s present claims, we are limited to 'pure questions of law,' *St. Cyr*, 53 U.S. at 305, *and* to issues of application of law to fact, where the facts are undisputed and not the subject of challenge." *Id.* at 211 (citation and punctuation omitted) (emphasis added). The Third Circuit further concluded that "if the REAL ID Act imposed a narrower standard of review than that previously offered under a petition for habeas corpus, a significant Suspension Clause issue would arise." *Id.* at 211, n. 5.

In sum, habeas review has traditionally encompassed claims involving regulations and the application of fact to law. A construction of the REAL ID Act that precludes review over these types of claims, such as that the Ninth Circuit embraced in *Ramadan* and in the present case, triggers constitutional issues. Consequently, unless the Court concludes that the REAL ID Act *compels* that construction, it should grant the writ in this case and clarify that 8 U.S.C. § 1252(a)(2)(D) preserves review over such claims.

B. The Text and History of 8 U.S.C. § 1252(a)(2)(D) Establish That "Questions of Law" Encompass More Than Issues of Statutory Construction.

The text of § 1252(a)(2)(D) provides for review of "questions of law." The term is unqualified. It does not state that only statutory questions are reviewable, thereby excluding claims involving regulations. Nor does it refer only to questions of statutory construction, thereby excluding questions

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contention that only a "purely legal question of statutory interpretation" is reviewable in habeas).

involving the *application* of statutes or regulations. Nothing in the text therefore warrants the conclusion that the statute applies only to a subset of legal claims. Accordingly, given the language of § 1252(a)(2)(D), it is "fairly possible" (*St. Cyr* at 300) to construe the statute to avoid the grave constitutional questions raised by a construction of the REAL ID Act that would limit review to a narrow set of statutory-construction claims.

Assuming, *arguendo*, it were necessary to consult the Act's legislative history, the Conference Report does not support the conclusion that the statute must be construed in a way that would trigger serious constitutional questions. The Conference report shows that Congress was well aware that, in light of the Suspension Clause, it had to preserve review over any claim that was previously cognizable in a traditional habeas action. Indeed, the report repeatedly references *St. Cyr* and the Court's admonition that a substitute to habeas must provide commensurate review. As it explains, the new § 1252(a)(2)(D) was intended to be just such a substitute. 151 Cong. Rec. H2813, H2873 (2005); *see also id.* (the new scheme "would provide an 'adequate and effective' alternative to habeas corpus") (citing *St. Cyr*).

The Report thus makes absolutely clear that Congress' goal was to streamline review into the courts of appeals, and *not* to eliminate any review that was previously available in habeas, much less to embroil the courts in Suspension Clause issues:

> Significantly, this section does not eliminate judicial review, but simply restores such review to its former settled forum prior to 1996. Under section 106 [of the REAL ID Act], all aliens ... will be able to ...raise constitutional and legal challenges in the courts of appeals . ... Unlike AEDPA and IIRAIRA, which attempted to eliminate judicial review ... section 106 would

> give every alien one day in the court of appeals, satisfying constitutional concerns.

Id. As discussed above, there is no doubt that those "issues that were historically reviewable on habeas" (Conf. Rep. at 2873) included claims concerning regulations and the application of law to fact. Importantly, the Conference Report recognizes (at 2873) that a "mixed question of law and fact" remains reviewable, and simply makes the point that only the "legal elements" of such questions will be reviewable and that the factual elements will not be reviewable."

C. The Ruling Below Deprived Petitioners of Their Constitutional and Statutory Right to Judicial Review of the Orders in Their Immigration Case.

While the intent of Congress was to "give every alien one day in the court of appeals," Mr. Lopez-Cancinos and Ms. Castillo de Lopez never had that day, at least not with respect to key issues in their case.

First, applying the view in *Ramadan* that only statutory issues are covered by the term "questions of law," the Ninth Circuit refused to consider Petitioners' argument that the IJ and BIA should have reviewed Mr. Lopez-Cancinos' claim to an "extraordinary circumstances" exception to the asylum filing deadline in light of 8 C.F.R. §208.4(a)(5)(i) ("Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past," may justify a filing delay). Clearly, the couple provided ample evidentiary support for the argument, and clearly, failure even to consider the applicability of the regulation raised a question of law.[8]

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[8] Just as clearly, it raised a due process issue, but the panel disagreed, without explanation. Contrary to its own caselaw, the Ninth Circuit likewise failed to address other due process issues, such as the Board's failure to review *any* documentary evidence relating to country conditions after 2000, and its adoption of the IJ's rationale in denying

Thus, the Ninth Circuit's narrow interpretation of 8 U.S.C. § 1252(a)(2)(D) violated the couple's rights under the Suspension Clause.

Second, based on the view, also expressed in *Ramadan*, that the application of law to undisputed fact is not a "question of law," the Ninth Circuit erroneously declined to review the determination that Mr. Lopez-Cancinos was ineligible for voluntary departure pursuant to 8 U.S.C. §1229c(b). Here, although the Board found that Mr. Lopez-Cancinos' lie was not material to his asylum claim, and accepted his explanation that he lied out of fear of being disbelieved and wrongfully denied relief, it summarily concluded that he was barred from establishing the requisite good moral character. *See* App. 12a. Yet one is only statutorily barred from making such a showing if one has given "false testimony for the purpose of obtaining any benefits." Where, as here, the facts are undisputed, the question is not the purely factual one of why an individual lied, but rather the legal question of the nature of a misrepresentation whose purpose has been established. At a minimum, the Court should have recognized its obligation to review the Board's application of these facts to the voluntary departure and good moral character statutes. Having failed to due so, it

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Ms. Castillo de Lopez' asylum claim, despite clear legal and factual errors in the underlying decision. *See Mohamed v. Gonzales*, 400 F. 3d 785, 792-93 (9th Cir. 2005) (Board must consider and address in their entirely the evidence submitted and arguments presented). Among other things, the IJ's statements that Ms. Castillo de Lopez introduced no evidence of threats against her nor of harm to similarly situated individuals, and that "nearly all" her family members remain safely in Guatemala cannot be reconciled with the evidence, and his statement that "reasonable factfinder could not be compelled [...] to conclude" that she had a well-founded fear cannot be reconciled with the legal standard for establishing a well-founded fear. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987). While recognizing, however, that the panel's errors in failing to address these issues resulted in a grave injustice to these petitioners, in light of the limitations of the issuance of the writ, *see* Supreme Court Rule 10, we limit our discussion of those errors to this footnote.

compounded the deprivation of Mr. Lopez-Cancinos' right to judicial review.

This case thus illustrates that the overly restrictive view courts have taken of the term "questions of law" and the Suspension Clause issues that arise therefrom. The Court should grant the writ to address this important issue.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

Respectfully Submitted,

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Counsel for Petitioners

Dated: November 21, 2006

APPENDIX

APPENDIX

TABLE OF CONTENTS

Page

Yuman Lopez-Cancino [sic], *and Yocari Castillo De Lopez, v.Alberto R.. Gonzales, Attorney General,* Order, No. 05-71479 & 05-75535 (9th Cir. August 25, 2006) 1a

Yuman Lopez-Cancinos and Yocari Castillo De Lopez v. Alberto R.. Gonzalez, Attorney General, et al., Memorandum, No. 05-71479 & 05-75535 (9th Cir. June 2, 2006) 2a

Yuman Lopez-Cancinos vs. Deborah Farritor, et al, Order, CIV. 05-333-TUC-CKJ (D. Az., Sept. 16, 2005) 4a

Lopez Cancino [sic], *Yuman Beltran,* A75-721-259, A75-476-579, Decision of the Board of Immigration Appeals (February 28, 2005) 6a

In the Matter of: *Lopez Cancino* [sic], *Yuman Beltran* A75 721 259, Decision of the Immigration Judge (July 12, 2002).....16a

In the Matter of: *Castilllo De Lopez, Yocari,* A75 476 579, Decision of the Immigration Judge (July 12, 2002) 34a

Page

Statutes and Regulations 56a

8 U.S.C. § 1101(f) 56a

8 U.S.C. §1229c(b) 56a

8 U.S.C. §1229c(f) 56a

8 U.S.C. §1158(a) 57a

8 U.S.C. §1231(b)(3) 57a

8 U.S.C. §1158(a)(3) 58a

8 U.S.C. §1252(a)(2)(D) 58a

8 C.F.R. §204(a)(5) 58a

FILED
AUG 25 2006
CATHY A. CATTERSON
CLERK. U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUMAN LOPEZ-CANCINO, and

YOCARI CASTILLO DE LOPEZ,

Petitioners,

V.

ALBERTO R. GONZALES,
Attorney General,

Respondent.

No. 05-7 1479 & 05-75535

Agency Nos.
A75-721-259
A75-476-579

ORDER

Before: FARRIS and THOMAS, Circuit Judges, and SCHIAVELLI,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Thomas voted to reject the suggestion for rehearing en banc and Judges Farris and Schiavelli so recommend. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

FILED
JUN 2 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YUMAN LOPEZ-CANCINOS, and YOCARI CASTILLO DE LOPEZ,

Petitioners,

V.

ALBERTO R. GONZALES, United States Attorney General, et al.,

Respondents.

Nos. 05-71479 & 05-75535

A75-721-259

A75-476-579

MEMORANDUM*

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted April 6, 2006

Pasadena, California

Before: FARRIS and THOMAS, Circuit Judges, and SCHIAVELLI,** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

** The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

Petitioners Yuman Beltran Lopez-Cancinos ("Yuman") and Yocari Selenita Castillo de Lopez ("Yocari") (collectively,

"Petitioners"), husband and wife, petition for review of the decision of the Board of Immigration Appeals ("Board") affirming the Immigration Judge's ("IJ") denial of their claims. Specifically, Yuman appeals the denial of his claims for asylum, withholding of removal, protection under the Convention Against Torture ("CAT"), and voluntary departure. Yocari appeals the denial of her asylum claim. We affirm.

The Court is without jurisdiction to review the denial of Yuman's claims for asylum and voluntary departure because the petition for review raises no cognizable constitutional claims or questions of law. 8 U.S.C. § 1 252(a)(2)(D); *Ramadan v. Gonzales*, 427 F.3d 1218, 1221 (9th Cir. 2005).

Turning to the remaining claims, we review the rejection of Yuman's withholding of removal and CAT claim and Yocari's asylum claim under the substantial evidence standard, and must affirm even if it is possible to draw differing conclusions from the evidence. *Pedro-Mateo v. I.N.S.*, 224 F.3d 1147, 1150 (9th Cir. 2000).

In light of the detailed country reports in the record below, we conclude substantial evidence supported the rejection of those claims on the grounds that changed country conditions in Guatemala rebutted any claims of potential future persecution. *Cf. I.N.S. v. Orlando Ventura,* 537 U.S. 12, 17 (2002) (recognizing the improved conditions in post-civil war Guatemala). We recognize that there was contrary evidence introduced by Petitioners regarding conditions in Guatemala. However, that evidence was insufficient to compel reversal. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) ("To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it....") (Emphasis in original).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Yuman Lopez Cancinos,	)	
Petitioner,	)	No. CIV 05-033-TUC-CKJ
vs.	)	
	)	
Deborah Farritor, et al.,	)	ORDER
Respondents.	)	

Pending before the Court is Respondents' Motion to Transfer (Doc. #12). Respondents request this action be transferred to the Ninth Circuit Court of Appeals pursuant to section 106 of the REAL ID Act, Pub.L.No. 109-13, 119 Stat. 231, 8 U.S.C. § 1252.

On May 9, 2005, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Respondents filed a Motion to Transfer the case on July 18, 2005. On August 9, 2005, Petitioner filed a Response to the Motion to Transfer; in that response, Petitioner agrees that the case should be transferred to the Ninth Circuit Court of Appeals.

The REAL ID Act "makes the circuit court the 'sole' judicial body able to review challenges to final orders of deportation, exclusion or removal." *Alvarez-Barajas*, 2005 WL 1906672, *2 (9th Cir. 2005). "To accomplish this streamlines judicial review, the Act eliminated habeas jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over final orders of deportation, exclusion, or removal." *Id.* "The REAL ID Act requires district courts to transfer all habeas petitions brought by aliens that were pending before the district court .... to the appropriate circuit court[.]" *Id.; see also* § 106(c).

In this case, Petitioner challenges the final administrative order of removal. Therefore, this Court must transfer the case to the Ninth Circuit Court of Appeals.

Accordingly, IT IS HEREBY ORDERED as follows:

1. The Motion to Transfer (Doc #12) is **GRANTED**, and;
2. The **Clerk of the Court shall transfer this matter to the United States Court of Appeals for the Ninth Circuit** pursuant to section 106 of the REAL ID Act.

DATED this 16th day of September, 2005.

Signature

Cindy K. Jorgenson
United States District Judge

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk TUC
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Lynn Marcus
1145 N. Mountain Ave.
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U.S. INS-Trial Attorney
Unit/TUS
P.O. Box 25158
Phoenix, AZ 85002

Name: LOPEZ CANCINO, YUMAN BELTRAN
A75-721 -259

Riders: 75-476-579

Date of this notice: 02/28/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

[Signature]
Frank Krider
Chief Clerk

Enclosure
Panel Members:
COLE, PATRICIA A.
FILPPU, LAURI S.
HESS, FRED

U.S. Department of Justice

Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

Files: A75 721 259 - Tucson

Date: FEB 28 2005

In re: YUMAN BELTRAN LOPEZ CANCINO
YOCARI SELENITA CASTILLO DE LOPEZ
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENTS: Lynn Marcus, Esquire
ON BEHALF OF DHS: John W. Seaman, Jr.
Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1 182(a)(6)(A)(i)] -
Present without being admitted or paroled (both respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

The respondents appeal from July 12, 2002, Immigration Judge's decisions denying their applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1158,1231(b)(3), and for relief from removal under the Convention Against Torture. The male respondent (Lopez Cancino) also appeals the Immigration Judge's denial of his application for voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c. The male respondent's appeal will be sustained in part, and the female respondent's appeal will be dismissed.

At the outset we address the Immigration Judge's determination that the male respondent failed to establish either changed circumstances or extraordinary circumstances to excuse his failure to file his asylum application within 1 year of his arrival in the United States. *See* section 208(a)(2)(B), (D) of the Act. Although the respondent's misplaced trust in an apparently dishonest attorney or imposter (Tr. At 98-99) may be an "extraordinary circumstances" that would excuse his initial failure to file, *see Iturribarria v. INS*, 321 F.3d 889, 897-98 (9th Cir.2003)(recognizing the equitable tolling of application deadlines if the alien is prevented from filing due to deception, provided that the alien acts with "due diligence" in discovering the deception), the respondent waited 2 years after

discovering the fraud before he properly filed an asylum application with the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service)(Tr. at 103). Given this delay, we conclude that the respondent did not hasten to file an asylum application within a "reasonable period" after discovering the fraud (Tr. at 101-06). *See* 8 C.F.R. § 1208.4(a)(5). Consequently, we affirm the Immigration Judge's finding that the respondent has not established the applicability of an exception to the 1 year deadline for filing.

We turn next to the respondent's application for withholding of removal under section 241(b)(3) of the Act. The Immigration Judge denied the respondent's application because he determined that the respondent was not credible (I.J. at 8-9). The Immigration Judge largely based his conclusion on the fact that the respondent had lied on the stand as to whether or not he had reentered Guatemala since his initial departure (Tr. at 108). Later the respondent voluntarily admitted in an affidavit that he had lied out of fear that someone who lives safely in the United States would not believe that the respondent had reentered Guatemala in order to secure a document that he believed necessary to apply for asylum (Exh. 9 Affidavit at 2-3). On appeal, the respondent challenges the Immigration Judge's adverse credibility finding. See Respondent's Brief at 49-57.

We agree with the respondent that under the governing precedent of the Ninth Circuit Court of Appeals, the Immigration Judge erred in speculating that (i) the respondent would not have briefly reentered Guatemala to secure an identity document if he legitimately feared persecution, even if the man he consulted as an attorney had misinformed him that he required such a document in order to apply for asylum (Tr. at 108); and (ii) the respondent's account was "too horrible and macabre to be true" (I.J. at 8). *See Salaam v. INS*, 229 F.3d 1234, 1238-39(9th Cir. 2000); *Shah v. INS*, 220 E.3d 1062, 1071 (9th Cir. 2000)(rejecting speculation and conjecture as proper bases for an adverse credibility finding). We further agree that the Immigration Judge erred by ruling the respondent's entire account to be incredible based upon the

respondent's dishonesty regarding how he received his identity document. *See Akinmade v. INS,* 196 F.3d 951,955 (9th Cir. 1999) holding that certain misrepresentations are not necessarily inconsistent with a claim of persecution). "Untrue statements by themselves are not reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case." *Turcios v. INS*, 821 F.2d 1396, 1400 (9th Cir. 1987). With the exception of the respondent's lie about not having reentered Guatemala, which he later freely admitted, his claim is consistent and detailed. Therefore, we find that there was insufficient evidence upon which the Immigration Judge could reject the respondent's veracity, and we find that the Immigration Judge's adverse credibility finding was in error. *See Salaam v. INS, supra*, at 1239; *Shah v. INS, supra*, at 1071; *Akinmade v. INS, supra*, at 957-58.

The Immigration Judge also concluded that the respondent knowingly filed a frivolous asylum application. "[A]n asylum application is frivolous if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20. The Supreme Court has stated that "a concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *See Kungys v. United States,* 485 U.S.759, 770 (1988). The respondent claimed on his written asylum application that he had not returned to Guatemala (Exh.9 Affidavit at 2-3). Because we find that the respondent's misrepresentation regarding his return should not properly influence our assessment of the respondent's asylum claim, we conclude that the fabrication was not a "material element" of his asylum claim and that the respondent's asylum application is therefore not frivolous within the meaning of the regulations. *See* 8 C.F.R. § 1208.20. Additionally, section 208(d)(4)(A) of the Act requires that an alien be advised of the consequences of knowingly filing a frivolous asylum application. We find it insufficient that the respondent's written asylum application contained the warning above the respondent's signature (Exh.2 at 8) and that the

respondent's attorney waived any further explanation of his client's rights (Tr. at 12-13). Because the Immigration Judge did not provide the male respondent an oral warning of the consequences of knowingly filing a frivolous application, we conclude that the bar to benefits that is imposed by section 208(d)(6) of the Act and 8 C.F.R. § 1208.20 cannot be invoked.

We next examine the specific details of the respondent's claim. To succeed in his application for withholding of removal, the respondent must show that it is more likely than not that his life or freedom would be threatened in Guatemala on account of a statutorily protected ground. *See INS v. Stevic*, 467 U.S. 407 (1984). The respondent seeks to meet this burden by showing that he faces such persecution based upon political opinion imputed to him by his persecutors. *See Matter of T-M-R-*, 21 I&N Dec. 775, 777 (BIA 1997).

According to the addendum to the respondent's written asylum application, military forces in Guatemala persecuted the respondent and his father based upon imputed political opinion, i.e., they were suspected of being anti-government guerrillas (Exh. 2 Addendum at 1-4). When the respondent was 15 or 16 years old, he was forcibly recruited into the Guatemalan military (Exh. 2 Addendum at 2-4). Because the respondent failed to appear when ordered to do so, soldiers arrived at the family home, arrested the respondent, and took him by force to a military base (Tr. at 83). Because the respondent had not appeared when ordered, the soldiers suspected that the respondent was a guerrilla; he was told that he had to serve in order to prove that he was not (Tr. at 82-83; Exh. 2 Addendum at 2). The respondent was forced to endure physical abuse, including being beaten with the backs of weapons, kicked in the head, and dragged by the hair (Tr. at 83,86,87-88; Exh. 2 Addendum at 3). The respondent was given no water and was fed meagerly (Tr. at 84; Exh. 2 Addendum at 2). The respondent was also subjected to mental abuse, including being forced to watch the killing of another recruit (Tr. at 85-87; Exh. 2 Addendum at 5). In addition, the soldiers threatened to kill

the respondent and his family as suspected guerrillas (Tr. at 85, 86; Exh. 2 Addendum at 4).

The respondent thereafter fled to Mexico with his mother's heip (Tr. at 92-93). Soldiers returned to the family home to search for the respondent (Tr. at 91-92; Exh. 2 Addendum at 3). The respondent's father returned to their village when he received word of the respondent's forced conscription. In an attempt to extract information as to the respondent's whereabouts, soldiers beat the respondent's father, broke his arm, and pulled out teeth and nails (Tr. at 93-95; Exh. 2 Addendum at 4). After this attack on the respondent's father, the respondent's parents also fled Guatemala to join the respondent in Mexico (Tr. at 93-95). The respondent's father later returned to Guatemala with the intention of selling the family home, and he has not been seen or heard from since that time (Tr. at 95-96).

We note that the Ninth Circuit Court of Appeals has found that the cumulative effect of several incidents experienced by a respondent can constitute past persecution. *See Mashiri v. Ashcroft,* 383 F3d 1112, 1120-21 (9th Cir. 2004). However, in the instant case we conclude that the cumulative impact of the respondent's experiences is insufficient to find persecution at the hands of Guatemalan security forces. Although the respondent's account is disturbing, "'[p]ersecution' within the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional." *Matter of V-T-S-,* 21 I&N Dec. 792,798 (BIA 1997); *see also Prasad v. INS,* 47 F.3d 336(9th Cir. 1995) (finding no persecution where the alien was taken to a jail cell and detained, during which time he was interrogated about his political beliefs, beaten, and kicked).

Even if we were to find that the respondent had established past persecution on account of imputed political opinion. we would also find sufficient evidence of a fundamental change in circumstances in Guatemala to support conclusion that the DHS has rebutted the presumption that the respondent's life or freedom would be threatened upon his return. See 8 C.F.R. § 1208.16(b)(l). Evidence of record shows

that conditions have improved in Guatemala since the peace accord in that country. According to the Department of State Guatemala Country Report on Human Rights Practices issued in February 2001 ("DOS Report"), "[t]he Government [of Guatemala] generally respects the human rights of its citizens" (Exh. 4 at 83), and "[t]here were no allegations of politically motivated killings by government agents" in 2000 (Exh. 4 at 84). Although general lawlessness and some human rights abuses by the nation's security forces continue, a review of the DOS Report does not reveal that former guerrillas or army deserters are being killed or otherwise targeted for persecution by virtue of their former status (Exh. 4 at 83-96). The respondent submitted the affidavit of an expert on violence and militarization in Guatemala (Exh. 4 at 49), who stated that "there is a strong chance that [the respondent] would be persecuted by ex-military members who remain in his community because of his suspected anti-military associations" (Exh. 4 at 50-52). However, this opinion does not find support in the country condition evidence of record, as we have noted above.

Because we have found that the respondent did not suffer past persecution in Guatemala and that, even if he had, DHS has rebutted any presumption of future harm to the respondent, we conclude that the respondent has not satisfied his burden of establishing that he would more likely than not suffer persecution in Guatemala on account of imputed political opinion. *See* 8 C.F.R. § 1208.16(b). The respondent has likewise failed to establish that it is more likely than not that he would be tortured upon his return to Guatemala, and his request for relief under the Convention Against Torture must also be denied. *See Matter of G-A-*, 23 I&N Dec. 366, 367-68 (BIA 2002).

Finally, we affirm the Immigration Judge's determination that the male respondent is ineligible for voluntary departure under section 240B of the Act as one who has given false testimony for a benefit under the Act and therefore cannot establish good moral character under section 101(f)(6) of the Act (I.J. at 12-13).

We now consider the asylum application of the female respondent. The addendum to the female respondent's written asylum application (Exh. 2) states that her father was forced to serve in the Guatemalan military. Her father later deserted (Exh. 2; Tr. at 189), and her mother began receiving notes threatening the respondent with kidnapping or death due to her father's desertion (Exh. 2; Tr. at 189-90). Her parents sent her to live with her grandparents, and she was escorted whenever she left their home (Exh.2; Tr. at 190-91).

The female respondent testified that she now fears returning to Guatemala since both her husband and father deserted from the military (Exh. 2; Tr. at 197). She stated that people in Guatemala know she is the wife of the male respondent and that because she has been absent and out of contact for several years, people would probably believe that she has contacts with the guerrillas (Tr. at 197-98). The female respondent also related that a cousin in Guatemala had been raped, hung, and shot (Tr. at 199) and that an unrelated woman in her community in Guatemala was believed to have been murdered by the same people who killed her husband, an army deserter (Tr. at 199-200,206). The female respondent's mother corroborated her daughter's account during her own testimony (Tr. at 152-53,154,158), and stated that the female respondent would indeed be at risk in Guatemala, primarily because she is the wife of an army deserter, but also because she is the daughter of a deserter (Tr. at 161-63). The respondents' expert on Guatemala also testified as to her belief that the female respondent would face a 20 to 30% chance of persecution if she returned to Guatemala (Tr. at 178). The expert added that the female respondent's absence while in the United States may serve to exacerbate her situation, for an "absence then creates this space for rumor and gossip about you" (Tr. at 180).

The Immigration Judge apparently found the female respondent and her supporting witnesses credible, and we do as well. *See Canjura-Flores v. INS,* 784 F.2d 885,889 (9th Cir. 1985) (presuming an alien to be credible when the Immigration Judge's decision is silent on the issue). However, for the reasons outlined in the Immigration Judge's written decision,

we affirm his determination that the female respondent has not met her burden of establishing that she suffered past persecution or that she has a well-founded fear of future persecution on account of imputed political opinion (I.J. at 11-13). *See Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). We would also emphasize that, as in the case of the male respondent, evidence of country conditions in Guatemala does not support the female respondent's claim, or that of her expert, that the close relatives of suspected guerrillas and military deserters would still face persecution (Exh. 4 at 83-96). Inasmuch as the female respondent has failed to satisfy the lower burden of proof required for asylum, it follows that she has failed to meet the higher standard for withholding of removal. *See INS v. Stevic*, 467 U.S. 407(1984). The respondent has likewise failed to establish that it is more likely than not that she would be tortured upon her return to Guatemala, and her request for relief under the Convention Against Torture must also be denied. *See Matter of G-A-*, 23 I&N Dec. 366, 367-68 (BIA 2002).[1]

In accordance with the foregoing, the following orders will be entered.

ORDER: The male respondent's appeal is sustained in part.

FURTHER ORDER: The male respondent is ordered removed to Guatemala.

FURTHER ORDER: The female respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the female respondent is permitted to voluntarily depart from the United States, without expense to the Government within 30 days from the date of this order or any extension beyond that time as maybe granted by the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service).

[1] We address the female respondent's eligibility for withholding of removal and protection under the Convention Against Torture although she has not argued these issues in her appellate brief.

See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the female respondent fails to so depart, she shall be removed as provided in the Immigration Judge's order.

NOTICE: If the female respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, she shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245,248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

[Signature]
FOR THE BOARD

Board Member Filppu respectfully concurs in the result but dissents from the findings that the respondent's written asylum application was not frivolous and that he has not shown past persecution within the contemplation of Ninth Circuit case law. A written asylum application filed with DHS may be found frivolous. 8 C.F.R. § 208.3(c)(5). Return to the country of alleged persecution is highly relevant, as reflected by the specific question on this issue in the 1-589

As for past persecution, the respondent suffered sufficient harm which was inflicted, at least in part on a qualifying ground, suspected anti-government political opinion. The majority, however, correctly discounts the opinions offered by the expert and denies withholding because of a fundamental change in circumstances.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
160 North Stone Avenue, Suite 300
Tucson, Arizona 85701

IN THE MATTER OF:	) In Removal Proceedings
	)
LOPEZ CANCINO, Yuman Beltran	) File No.: A 75 721 259
	)
Respondent	) Date: July 12, 2002

CHARGES: § 2 12(a)(6)(A)(i) of the Immigration and Nationality Act (Act), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than designated by the Attorney General.

APPLICATIONS: Asylum pursuant to § 208 of the Act.
Withholding of Removal pursuant to § 241(b)(3) of the Act.
Convention Against Torture[2]
Withholding of Removal pursuant to 8 C.F.R. §208.16(c).
Voluntary Departure Pursuant to § 240B(b) of the Act.

On Behalf of Respondent:	On Behalf of Service:
Tanya Kramer, Law Student	Daniel H. Ragsdale, Esq.
Megan McClurg, Law Student	Assistant District Counsel
Lynn Marcus, Esq.	U.S. I.N.S.
Immigration Law Clinic	2035 N. Central Ave.
University of Arizona James	Phoenix, AZ 85004

[2] The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A.Res.39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708, (1984)(entered into force June 26, 1987; for the United States Apr.18 1988)(available on the U.N.website http://www.un.org/).

E. Rogers College of Law
1145 North Mountain Ave.
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DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent is a male alien, native and citizen of Guatemala. The Immigration and Naturalization Service (Service) alleges that on or about May 15, 1997, Respondent entered the United States at or near San Ysidro, California. At that time, the Service alleges, Respondent was not admitted or paroled after inspection by an Immigration Officer.

Based on the foregoing allegations, the Service charged Respondent with removability pursuant to §212(a)(6)(A)(i) of the Immigration and Nationality Act (Act), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than designated by the Attorney General.

Respondent's initial Master Calendar Hearing was held on February 28, 2001. At that time, Respondent, by and through counsel, conceded receipt of the Notice to Appear (Exhibit 1). Respondent's counsel requested to withdraw from the case. The Court granted counsel's request and continued the case to all Respondent an opportunity to procure counsel.

Respondent's Individual Hearing was held on October 31, 2001. At the Individual Hearing Respondent, his wife, and two expert witnesses testified on Respondent's behalf.

II. Findings of Fact

A. Testimony of Expert Witness, Dr. George Gafner, Volunteer Psychotherapist at University of Arizona Refugee Clinic, Department of Family and Community Medicine

Dr. Gafner is the director of the family therapy training program at the Veteran's Affairs Medical Center. He trains and supervises psychologists, social workers, and counselors in mental health for individuals and families. His duties include providing mental health services to people with anxiety and mood disorders. He has counseled thousands of patients over the years. He also serves as a volunteer psychotherapist at the University of Arizona Refugee Clinic, Department of Family

and Community Medicine. His duties at the clinic include providing psychological evaluations and counseling of refugees. He helps refugees with various disorders associated with adjusting to a new society, including culture and language disorders, and post-traumatic stress (PTSD).

Dr. Gafner explained that PTSD is a psychological and behavioral reaction exhibited by certain people who have personally experienced trauma. The symptoms of PTSD include avoidance, arousal, re-experiencing, anger, nightmares, and intrusive thoughts. It is not known exactly what causes PTSD, but the Doctor hypothesized that the length and severity of the various stressors a person experiences throughout their life can bring on PTSD. Different kinds of treatment are used for PTSD, including exposure therapy and hypnosis. The Doctor believed that PTSD has an effect on a person's decision making. For example, the patient will have difficult with memory, concentration, and managing relationships with family members.

The Doctor makes a diagnosis of PTSD by interviewing the patient and inventorying the severity of symptom the patient exhibits. In making a diagnosis, Dr. Gafner evaluates whether or not the patient is relaying the facts in a truthful manner by judging if the facts the patient relays match their emotional content. For example, typically patients with PTSD will avoid talking about their past experiences. In his own experience, approximately 40% of the Central American refugees he has treated have PTSD symptoms. Dr. Gafner does not believe that the Central American refugees fain PTSD symptoms.

Dr. Gafner first met Respondent in September 2000. He has met with Respondent five times since that date. In Dr. Gafner's first meeting with Respondent, he evaluated Respondent by taking a history, described Respondent's symptoms, and gave a diagnosis of PTSD. Dr. Gafner made the diagnosis of PTSD because Respondent had the following symptoms: intrusive thoughts, nightmares, difficulty sleeping, difficulty concentrating, daydreams, generalized fear of uniforms, avoidance, and depression. The doctor believes Respondent's PTSD was triggered by the following experiences

in Guatemala: Respondent's forced inscription in the Guatemalan army at the age of 16; having to watch the beating, torture, and killing of a suspected guerilla; and the arrest beating and disappearance Respondent's father. Dr. Gafner prescribed the anti-depressant medication, Zoloft. Dr. Gafner said that Respondent continued to exhibit PTSD symptoms at their second meeting in October. At that meeting; the Doctor began desensitization treatment with Respondent. Respondent did not show up to his third appointment, and the Doctor lost touch with Respondent until October 2001.

Dr. Gafner believes that the Zoloft anti-depressant medication helped Respondent. He expects Respondent should continue taking Zoloft for months or even years because depression is a symptom of PTSD. If the treatment of the depression is continued, the PTSD symptoms are generally less severe. If Respondent was removed to Guatemala, Dr. Gafner believes that it would be very likely that Respondent's condition would deteriorate because of his fear and the reactivation of the PTSD.

On cross-examination by the Service, the Doctor conceded that aliens who are illegally present in the United States may be depressed because they lack a legal status. Dr. Gafner conceded that aliens may not enjoy things that other people enjoy because of their immigration problems. He also conceded that a fear of people in uniforms may be a result of the fact that they are present illegally in the United States, and they fear being caught by uniformed members of the Service. Respondent conceded that he did not personally know Respondent's condition from October 2000 until October 2001, but he stated that Respondent and Respondent's wife told him that Respondent was not doing well during that time period because he quit taking the Zoloft medication.

B. Testimony of Expert Witness, Dr. Linda Green, Assistant Professor, Department of Anthropology, University of Arizona

Dr. Linda Green is an Assistant Professor in the Department of Anthropology at the University of Arizona in Tucson, Arizona. She has taught theory and social culture

anthropology, medical anthropology, and transnational migration for the past eight years. She graduated from the University of California at Berkeley, California, with a Ph.D. in Anthropology. Currently, she teaches a Ph.D. class at the University of Arizona on power and violence in Latin America with an emphasis on Guatemala.

Her area of expertise in which she wrote her dissertation and has performed numerous studies is violence in Guatemala. She lived in Guatemala for nearly three years, and she has been to Guatemala every year since 1985. Furthermore, she has a great deal of contact with other professionals in Guatemala as Dr. Green is affiliated with two research institutions located in Guatemala.

Dr. Green described what life would have been like in a Guatemalan village during the 1990s. She stated that the civil war had ended, but there was still a great deal of tension prior to the peace accords because there was movement among the guerillas and the Guatemalan military. Dr. Green believed the central and western highlands were the central focus of the war in the 1980s and after the peace accords were signed in the 1990s because the guerillas organized Guatemalans who lived in the highlands, and they killed individuals from international organizations, the government, and the church who were involved with development projects in the highlands.

She stated that the Guatemalan military recruited indigenous men for civil patrol, military positions, and the monitoring of guerilla movements. The Guatemalan military always suspected the indigenous of being guerillas. The indigenous' movements were constantly monitored by the Guatemalan government, and many indigenous were killed by the Guatemalan military. The Guatemalan military would sweep indigenous villages (i.e. massacre the indigenous) regardless of whether the guerillas were there or not. Many of the indigenous were forcibly recruited into the Guatemalan military. At the height of the war there were 40,000 Guatemalan soldiers. The majority of them were indigenous, but Dr. Green did not know how many of those indigenous were forcibly recruited. Dr. Green had several indigenous men

tell her that they were tortured and abused by the Guatemalan military.

Dr. Green also addressed the current country conditions in Guatemala. She stated that the current country conditions, including economic conditions and human rights conditions, are deteriorating rapidly. This is due, in part, to a drought over the past year. She stated that the president in Guatemala is democratically elected, but the political conditions are quite bad because the men who are in positions of power, including the leaders at the local township level, were all commanders in the military during the civil war. She stated that none of these leaders have been punished for the human rights abuses they committed during the civil war because impunity from those types of crimes was written into the peace accords.

Dr. Green believed the peace accords have had a negative impact on Guatemala because they provided a facade of peace and democracy in that country to the international community. She asserted that many of the provisions of the peace accords have not been implemented. For example, the military did not retreat from domestic affairs. She also stated that the social tensions underlying the civil war are still present.

Finally, Dr. Green asserted that Respondent would have difficulty finding medical treatment in Guatemala because most of the medical care facilities in Guatemala are located in Guatemala City. She stated that there are only small hospitals in the 22 municipalities. Those hospitals only provide a room, a bed, and a doctor. The patient must pay for their own medicine and bring their own food, toilet paper, soap, towels, and syringes because the hospitals do not have equipment and medicines to use.

C. Testimony of Yocari Castillo de Lopez, Wife of Respondent

Mrs. Castillo de Lopez testified to the following facts. She is a native and citizen of Guatemala, and she is the wife of Respondent. They met in Guatemala in November 1995. Mrs. Castillo de Lopez left Guatemala in December 1996. She married Respondent in the United States in 1999.

She described Respondent as sad and nervous. She said Respondent has many nightmares; for example, he dreams that he is seeing dead people or being killed. Respondent is not violent to Mrs. Castillo de Lopez. She said Respondent has a very bad memory; for example, he does not remember the date they were married or when their child was born. Mrs. Castillo de Lopez said there has been only a small improvement in Respondent's condition since he started seeing Dr. Gafner. In general, he is always in a bad mood. He locks himself alone in rooms, and he still has nightmares.

D. Testimony of Yuman Beltran Lopez Cancino, the Respondent

Respondent testified to the following alleged facts. He is 22 years old. He is a native and citizen of Guatemala. Respondent has six brothers and sisters. Respondent grew up during the civil war in a small village of about 50 families located in the central highlands. There were several poor, indigenous families in his village that supported the guerillas because the guerillas supported the poor. Respondent stated that he was not in favor of either the guerillas or the Guatemalan military.

Respondent said he first saw the guerillas when he was five years old. All of the villagers started screaming and crying. His mother hid the family under the bed. The guerillas broke into the village houses looking for food. When the guerillas left, the Guatemalan military came to the village and started shooting the indigenous. They broken into Respondent's house and took his father to the center of the village where they brutally beat him and accused him of being a guerilla. Respondent's brother-in-law and sister were also accused of being guerillas. They came to the United States in 1993.

Respondent first came into personal contact with the Guatemalan military when he was 17 years old. A military leader came to the house and gave him a letter. The letter said he had to present himself for military service. Respondent did not present himself for military service because his mother did not want him to leave. One week after Respondent was

supposed to present himself, four soldiers came to his house and forcibly recruited him. They accused him of being a guerilla because he did not want to fight with the military. They grabbed him and took him to a military base. At the base, Respondent was forced to go through intensive military training. If Respondent did not do what the military officers told him to do, he was hit. Respondent went through the training 12 hours every day with only one small meal each day. Respondent's military training lasted 15 days.

During Respondent's training, the military accused another young man of being a guerilla. They forced the man to dig a whole and hit him. Then, they forced the military recruits, including Respondent, to hit the man. Respondent did not want to hit the young man, but he hit the young man only once very lightly because Respondent was afraid the soldiers would hit him if he did not participate. Respondent said the military leaders tortured the man by pulling his nails off and beating him. Then, they took the rope that the man had around his waist and stuffed it in his mouth. The man slowly asphyxiated and died while the military recruits were forced to watch. Respondent thought about the man's death often. He had nightmares of the man begging the guerillas for mercy. After the man was killed, Respondent continued to go to the military training because he was afraid the military leaders would also kill him.

On the last day Respondent went to the military training, Respondent was performing squats with a heavy piece of wood on his back. He lost his balance and dropped the piece of wood. Before he could pick up the piece of wood to continue the squats, eight soldiers came and beat him with their weapons and kicked him with their steel-toed boots. Respondent fell to the floor, and the soldiers continued to beat and kick him. They pulled Respondent by his hair around the entire base. Respondent was afraid that they were going to kill him. After the incident, Respondent could not move his arms or legs, and he spit up blood. The soldiers did not provide him with medical attention. Respondent has several small scars on his head, arms, and legs from that incident.

Respondent did not return to the military base after that incident because his mother did not want him to return. The soldiers came looking for him the day after he did not return to the base. His mother hid him in the roof of the house. They told Respondent's mother that if he did not return to the military base, the soldiers would kill him. Respondent left his village the next day. His mother had saved money so that he could escape.

When Respondent left, he traveled to Chiapas, Mexico, because his mother thought he would be much safer there. his parents and one younger brother followed him to Mexico later. When Respondent met his parents, he discovered that the Guatemalan police had tortured his father after Respondent fled the military training. They asked Respondent's father about Respondent's whereabouts, and Respondent's father said he did not know where Respondent was. The police then broke his father's arm and knocked out his front teeth. The Guaternalan police also pulled out his nails. Respondent felt terrible about his father's mistreatment by the Guatemalan police because he blamed himself. Respondent's father decided to return to Guatemala to sell the family's house. Since then, Respondent has heard nothing about his father. The family suspects that Respondent's father was tortured and killed by the police because he was not the type of person to desert his family.

Respondent spent approximately one month in Mexico. He decided not to stay there because he did not have any money or a place to stay. He decided to travel to the United States so he could reunite with his sister in Pamona, California. He also wanted to find a job in order to financially support his mother. He spent two year with his sister in Pamona, California.

When he arrived in California, he tried to file for asylum through a lawyer/notary named Amber Amberto Rodriguez that had been recommended to his sister. Respondent thought Mr. Rodriguez was a lawyer because he had a secretary and his own office where he met with clients. Respondent also saw diplomas hanging on the walls. Respondent went to Mr. Rodriguez's office several times. The Mr. Rodriguez said that he would help Respondent petition for political asylum. Mr. Rodriguez asked Respondent for his birth

certificate and identity documents. Respondent's brother-in-law helped him to obtain those documents from Guatemala. Mr. Rodriguez charged Respondent $700 dollars for his services. He told Respondent it would take ninety days to receive a response from the Service.

Respondent never received any further notice from Mr. Rodriguez. When Respondent and his sister went to look for Mr. Rodriguez, his office was closed. They tried to search for him, but the other local businesses told Respondent that the office had been closed for many days. Respondent and his sister went to the office many times, but they never found Mr. Rodriguez. Even though Mr. Rodriguez disappeared, Respondent thought he had filed for Respondent's political asylum.

Respondent did not know what to do to receive a response from the Service regarding his political asylum application. He did not go to the Service to check on his asylum application because he thought the Service would deport him if he did not have an attorney. He thought he needed to get a lawyer to find out what happened to his asylum application, but he did not get a lawyer because he did not have any money.

After Respondent found out that his future wife had arrived in the United States, he moved to Tucson, Arizona. Respondent met his current attorney in Tucson. He told his attorney that he had filed an asylum application in California hut that he never received a response. His attorney investigated Respondent's alleged asylum application, and she discovered that Respondent's asylum application had never been filed. Respondent was upset when he found out that his application had never been filed. His current attorney informed him that he would encounter legal problems because a year had passed since he had arrived in the United States; however, they decided that the best course of action would be to file a new asylum application.

Respondent stated that he has terrible nightmares. He dreams that he and the people around him are being tortured and killed. His sister gave him some medication to help him sleep better. He also saw Dr. Gafner for his behavioral

problems and his nightmares. Respondent stated that Dr. Gafner's treatment helped him sleep better. Respondent wishes to continue his therapy, but he does not think that he can continue it in Guatemala.

On cross examination, Respondent reconfirmed that, when he first applied for political asylum, his brother-in-law was the person in charge of getting his identity documents from the Guatemalan government. Respondent stated that he gave those documents to Mr. Rodriguez and that Mr. Rodriguez never returned the identity documents to him. Respondent stated that the identity documents his present attorney filed on his behalf are similar to the ones he gave to Mr. Rodriguez, but they are not the same. Respondent received the current identity documents when he filed the application to marry his wife in 1999. However, the current identity documents are dated 1997, and they have Respondent's signature on them. Respondent denied that he signed the identity documents. Respondent stated that his thumb print on the identity document was placed there at Mr. Rodriguez's office. The Judge asked Respondent how his thumb print could have been placed on the presently filed identity documents in Mr. Rodriguez's office if the identity documents from Mr. Rodriguez's office had been lost. Respondent replied that he was confused.

Thereafter, on April 19, 2002, respondent, through counsel, wrote a letter to the Court admitting that he had given false testimony with regard to the manner in which he obtained his Guatemalan identity document. The respondent then offered a new affidavit explaining that he had returned to Guatemala to procure an identity document and that he had committed perjury at his earlier hearing because he did not think that anyone would believe that he would return to a country where he claims to have been treated so badly just to obtain an identity document.

III. Credibility Determination

Before determining whether Respondent meets the statutory criteria required for the various forms of relief from removal, the Court will address the credibility of the Respondent.

The Court finds the respondent entirely incredible and not worthy of belief. At the hearing, respondent seemed to fare well under friendly questioning by his counsel, although in the Court's opinion the tale the respondent was spinning seemed to be too horrible and macabre to be true, especially in light of the fact that it all happened well after the peace accord in Guatemala. Then, under cross examination the respondent's story began to unravel and became evasive and complained that he was "confused" as to many details, especially as to how he obtained identify documents. Later, of course, respondent admits committing perjury at the hearing and says he returned to Guatemala a few months after his initial entry into the United States and went to the city hall of the town having the registry for the town where respondent was born. Respondent explains the lie by saying that he did not believe that anyone would believe that he would return to a country where he claims to have been treated so badly just to obtain an identity document. In this respect the respondent is correct. The Court does not believe that respondent would return to Guatemala if his experiences were as he described, certainly not for a mere identity document. Of course, now that the respondent has admitted committing perjury about a material aspect of his asylum claim, the Court can only guess as to the voracity of any statement made by the respondent. This, of course, is the problem Shakespear articulated when he wrote about the tangled web we weave when we first practice to deceive.

IV. Standards for Timely Filing of Asylum Application

An applicant for asylum has the burden of proving by clear and convincing evidence that the application has been filed within one year after the date of the alien's arrival in the United States. §208(a)(2)(B) of the Act; 8 C.F.R. §208.4(a)(2)(A). The one year deadline shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. 8 C.F.R. § 208.4(a)(2)(B)(ii). If the alien cannot meet this burden, he must prove to the satisfaction of the asylum officer, immigration judge, or Board of Immigration Appeals that he qualifies for an exception to the one year deadline. 8 C.F.R. § 208.4(a)(2)(B). An application for

asylum will be considered if the alien demonstrates either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified. See § 208(a)(2)(D) of the Act.

Changed circumstances may include: changes in conditions in the applicant's country of nationality, or if the person is stateless, country of last habitual residence and changes in objective circumstances relating to the applicant in the United States. 8 C.F.R. §208.4(a)(4)(i). If changed circumstances are found, the applicant shall apply for asylum within a reasonable time. See 8 C.F.R. §208.4(a)(4)(ii). Extraordinary circumstances, as contained in §208(a)(2)(D) of the Act, shall refer to events or factors beyond the alien's control that caused the failure to meet the one-year deadline. 8 C.F.R.§208.4(a)(5). Such circumstances shall include: serious illness or mental or physical disability of significant duration, legal disability, ineffective assistance of counsel, the fact that the applicant maintained temporary protected status until a reasonable period before the filing of the asylum application, and the fact that the applicant submitted an asylum application prior to the expiration of the deadline, but the application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period thereafter. Id. Such circumstances shall excuse the failure to file within the one-year deadline so long as the alien filed the application within a reasonable period given those circumstances. Id, See also, Ismailov v. Ashcroft, 263 F. 3d 851 (9th Cir. 2000).

V. Respondent's Asylum Application

A. The Asylum Application was Untimely Filed

Respondent's asylum claim shall be denied since it does not meet the requirements under the regulations, the Act, and case precedent. Respondent arrived in the United States on, or about, May 15, 1997. Therefore, he must have filed his asylum application by May 15, 1998, for it to be considered timely filed. See 8 C.F.R. §208.4(a)(2)(B)(ii). Respondent did not file his application until October 2000. Since he cannot meet the

burden of demonstrating by clear and convincing that his application was timely filed, he must prove to the Attorney General that he qualifies for an exception to the one year deadline by demonstrating either the existence of changed circumstances which materially affect his eligibility for asylum or extraordinary circumstances relating to the delay in filing. See 8 U.S.C. §208.4(a)(2)(D) of the Act, 8 C.F.R. §208.4(a)(2)(B).

B. The Untimely Filing was not an Extraordinary Circumstance

The Court will deny the asylum application because Repondent's failure to submit a timely filing of his asylum application was his own fault. Respondent is not eligible for relief under §208(a)(2)(D) of the Act because his failure to file a timely asylum application resulted from a bad decision that Respondent consciously made. Rather than obtaining a lawyer, Respondent claims he was beguiled by Mr. Rodriguez, a "notario" purporting to be a lawyer.

Assuming, arguendo, that the hiring of a notario was an exceptional circumstance pursuant to §208(a)(2)(D) of the Act, Respondent would still need to prove that he filed the asylum application within a reasonable period given those circumstances. 8 C.F.R. §208.4(a)(5). In his testimony, Respondent admitted that he was aware that there was a problem with his asylum application in 1998 when the notario closed his office without any notice and without providing a forwarding address. Yet, Respondent, of his own accord, chose not to file a asylum application, notify the immigration authorities, or hire a new attorney until 2000, more than two years later. Respondent's only excuse was that he did not have the money to hire a new attorney, and the thought he had to have an attorney to go to the Service's office. This is not a reasonable explanation for the failure to file an asylum application within a reasonable period of time after the one-year deadline. Therefore, the Court finds that under the circumstances, Respondent did not file his asylum application within a reasonable period after the one-year deadline.

VI. Standards for Asylum

Although Respondent is not eligible for the lesser evidentiary standard required of applicants for asylum, the Court will nevertheless evaluate the claim for asylum against that standard. An alien bears the evidentiary burdens of proof and persuasion in any application for withholding of removal under §241(b)(3)(A) or asylum under § 208 of the Act. See Matter of Acosta, 19 I. & N. Dec. 211, 214-215 (BIA 1985), modified, Matter of Mogharrabi, 19 I. &N. Dec. 439 (BIA 1987); 8 C.F.R. §§208.13(a), 208.16(b) (1998).

To merit a discretionary grant of asylum under § 208(a) of the Act, an alien must first demonstrate that he meets the definition of a refugee pursuant to § 101(a)(42(A) of the Act. A person qualifies as a refugee if he is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection" of his home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42(A); See INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

The persecution may be caused by the government or by a non-governmental entity which the government is unable or unwilling to control. McMullen v. INS, 685 F.2d 1312, 1315, n. 2 (9th Cir. 1981); Matter of Acosta, 19 I. & N. Dec. 222 (BIA 1985).

An alien may qualify as a refugee if he has either suffered actual past persecution or if he possesses a well-founded fear of persecution. 8 C.F.R. §208.13(b) (1998). Past persecution alone satisfies the requirement of § 101(a)(42)(A) regardless of whether there is a well-founded fear of future persecution upon return to the alien's home country, unless a preponderance of the evidence establishes that circumstances in the alien's country of nationality or last habitual residence have changed since the persecution occurred. INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987); Matter of Chen, 20 I. &N. Dec. (BIA 1989); 8 C.F.R. §208.13(b)(1)(I) (1998). A respondent for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear

persecution based on one of the five statutorily protected grounds. Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

The alien must demonstrate that the fear is objectively and subjectively well-founded. The alien's testimony may suffice to meet the burden of proof if it is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." Id. at 445. The objective component of "well-founded fear" may be satisfied through evidence about conditions in the respondent's home country, that country's system of justice, the respondent's experiences while living there, and the experiences of others. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The testimony will satisfy the objective test as long as the testimony is "credible, persuasive, and specific." Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987). Thus, to meet his or her burden of proof, the respondent must point to specific, objective facts that will support an inference of either past or future persecution. Matter of Chen, 20 I. & N. Dec. (BIA 1989).

Once an alien has established that he meets the statutory definition of a refugee under §101 (a)(42) of the Act, an Immigration Judge may exercise discretion and grant or deny asylum. The respondent has the burden of establishing that he merits a favorable exercise of discretion. Matter of Shirdel, 19 I. & N. Dec. 33 (BIA 1984). All factors, both favorable and adverse should be considered; however, in the absence of any adverse factors, asylum should be granted. Matter of Pula, 19 I. & N. Dec. 467, 474 (BIA 1989).

General background information about a country, where applicable, must be included in the record as a foundation for a respondent's claim of asylum and withholding of removal. Matter of S-M-J-, Int. Dec. 3303 (BIA 1997).

A persecution claim which lacks credibility/veracity cannot satisfy the burdens of proof and persuasion necessary to establish for asylum and restriction of removal. *See generally Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. § 208.13(a) and §208.16(b).

VII. Applicant's Application for Asylum

A. Eligibility on the Merits

As noted above, respondent completely lacks credibility. He has admitted to committing perjury as to material facts regarding his claim. His stated purpose for committing this perjury was the fact that he thought it would be detrimental to his asylum claim if the Court knew that he had returned to Guatemala a few months after his first entry into the United States. This demonstrates a sophisticated knowledge of asylum claims on the respondent's part and the planned and calculated lying on his part. The Court therefore concludes that respondent has failed to satisfy the burden of proof necessary to establish an asylum claim or any other claim.

B. Discretionary Eligibility for Asylum

Once an alien has established that he or she meets the statutory definition of a refugee under § 101(a)(42) of the Act, the Immigration Court may exercise discretion and grant or deny asylum. INS v. Cardoza-Fonseca, supra. The respondent has the burden of establishing that he or she merits a favorable exercise of discretion. Matter of Shirdel, 19 I&N Dec. 33 (BIA 1984). Even if respondent was eligible for asylum, the Court would deny it as a matter of discretion based upon respondent's perjury.

VIII. Respondent's Application for Withholding of Removal Under §241(b)(3) of the Act and the Convention Against Torture (CAT)

On the basis of the foregoing, the Court finds that Respondent has not met his burden of proof for both Withholding of Removal under §241(b)(3) of the Act and CAT.

IX. Application for Voluntary Departure

Respondent has admitted to giving false testimony for a benefit under the Immigration Act, and therefore cannot prove good moral character per Section 101(f)(6) of the Act. Therefore, respondent is not eligible for post-hearing voluntary departure.

Accordingly, the following orders shall be entered by the Court:

IT IS ORDERED that Respondent's Application for Asylum under § 208 of the Immigration and Nationality Act be **DENIED.**

IT IS FURTHER ORDERED that Respondent's request for relief under the Convention Against Torture pursuant to 8 C.F.R. §208.13(c)(1) be **DENIED**.

IT IS FURTHER ORDERED that Respondent's request for the relief Voluntary Departure be **DENIED.**

IT IS FURTHER ORDERED that Respondent shall be deemed to have filed a frivolous application for asylum and shall be forever barred from receiving any benefits under the Immigration Act.

IT IS FURTHER ORDERED that Respondent be removed from the United States to **GUATEMALA** on the charge contained in the Notice to Appear.

[signature]

Richard Knuck
United States Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) [circled] Personal Service (P)
To: [X] INS [ ] Alien [X] Alien's Attorney
Date: Jul 12 2002 **By:** Court Staff [initials: RK]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
160 North Stone Avenue, Suite 300
Tucson, Arizona 85701

IN THE MATTER OF:	)	In Removal Proceeding
	)	
CASTILLO DE LOPEZ, Yocari	)	File No.: A 75476579
	)	
Respondent	)	Date:

CHARGES: § 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at anytime or place other than designated by the Attorney General.

APPLICATIONS: Asylum pursuant to § 208 of the Act.
Withholding of Removal pursuant to § 241(b)(3) of the Act.
Convention Against Torture[3]
Withholding of Removal pursuant to 8 C.F.R. § 208.16(c).
Voluntary Departure Pursuant to § 240B(b) of the Act.

On Behalf of Respondent:	**On Behalf of Service:**
Danielle D. Hansen, Law Student	Daniel H. Ragsdale,Esq.
David Kettering, Law Student	Assistant District
Lynn Marcus, Esq.	Counsel
Immigration Law Clinic	U.S. I.N.S.
University of Arizona James E.	2035 N. Central Ave.

[3] The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39-46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39-708, (1984)(entered into force June 26, 1987; for the United States Apr. 18 1988)(available on the U.N. website http://www.un.org/).

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Phoenix, AZ 85004

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent is a female alien, native and citizen of Guatemala. The Immigration and Naturalization Service (Service) alleges that on or about January 7, 1997, Respondent entered the United States at or near Nogales, Arizona. At that time, the Service alleges, Respondent was not admitted or paroled after inspection by an Immigration Officer.

Based on the foregoing allegations, the Service charged Respondent with removability pursuant to § 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than designated by the Attorney General.

At a Mater Calendar hearing held on October 31,2001, the Court admitted Respondent's 1-589 Application for Asylum and Withholding of Removal (Exhibit 2). The Court warned Respondent against filing a frivolous asylum application.

Respondent's Individual Hearing was held on April 30, 2002. At the Individual Hearing, Respondent, by and through her attorney, moved to consolidate Respondent's case with her husband's case. The Court agreed to consolidate the two cases. However, two separate orders will be issued for each Respondent since the husband's Individual hearing was held on October 31,2001. At that time, Respondent, by and through counsel, conceded receipt of the Notice to Appear (Exhibit 1), admitted the charge contained in the Notice to Appear, conceded removability, and declined to designate a country of removability. Respondent requested asylum, and, in the alternative, voluntary departure. The Court, designated Guatemala as the country of removability and again warned Respondent against filing a frivolous asylum application.

The Court admitted the following documents into evidence: Supplementary Documents to Respondent's 1-589

Asylum Application (Exhibit 3); Materials Relevant to Past and Current Country Conditions in Guatemala (Exhibit 4); Unopposed Motion to Consolidate Respondent and her Husband's Cases (Exhibit 5); Document to Ensure Consideration of Spouse as Derivative of Respondent's Asylum Claim (Exhibit 6); Letter from the Hopi Foundation Center for the Prevention and Resolution of Violence (regarding violent behavior of Respondent's father) (Exhibit 7); Affidavit of Persida Castillo, Respondent's mother (Exhibit 8); and Brief Regarding Ongoing Eligibility for Relief and Lack of Frivolous Claim Despite Male Respondent's Perjury to the Immigration Judge (Exhibit 9). Respondent and her mother testified on Respondent's behalf.

II. Findings of Fact

A. Testimony of Persida Castillo, the mother of Respondent

Ms. Castillo is the mother of the Respondent and the wife of Jeronimo Castillo. (Jeronimo is Respondent's father.) Ms. Castillo was born in Santa Rosa, Guatemala, a very small village located in the mountains where only her parents and grandparents lived. Ms. Castillo was 15 years old when she married Jeronimo and moved to Camoja Grande to live with her in-laws. Camoja Grande was a small village, but it was larger than Santa Rosa. The couple lived in Camoja Grande for a year when Ms. Castillo inherited a house in Santa Rosa from her parents. The couple moved to that house in Santa Rosa.

Ms. Castillo had 3 children total, Respondent and 2 males (age 18 and 13). When they were first married, Jeronimo supported his family by working in the fields and doing yard work for an attorney.

When the civil war broke out, her husband was in the Guatemalan military. The family was scared because there was fighting between the guerillas and the Guatemalan military in both Camoja Grande and Santa Rosa. Jeronimo was first recruited into the military for a period of 6 months. After that, Jeronimo became very ill. The doctors determined that he had a problem with his stomach, and Jeronimo returned to his family in Santa Rosa. The military continued to try to recruit Jeronimo,

but he continued to tell them that he was sick. Finally, the military told Jeronimo that he would have to serve in the Reserves. Jeronimo served in the Reserves for 2 years. After the 2 years, Jeronimo was supposed to return to military service, but he did not want to go. Jeronimo hid for 3 to 4 months from the military, but then he agreed to serve in the military. He asked the military not to hurt him because he was afraid the army would consider him a deserter and beat him for that reason. Jeronimo served in the army for another 2 years. He also served as part of the Civil Patrol where he patrolled the mountains looking for guerrillas once a week. After those 2 years, Jeronimo deserted the military again, and he fled to Mexico in 1988. Ms. Castillo did not hear from Jeronimo again until 1989 when he was already in the United States.

After Jeronimo fled Guatemala, Ms. Castillo remained in her house. Men dressed in civil clothing continued to come by her house to ask where Jeronimo was hiding. Ms. Castillo did not know if the men were in the military or not. Ms. Castillo was very scared that the military would hurt her because her husband deserted from the military, so she decided to live with her in-laws. Her 2 sons stayed with her parents, and Respondent lived with Ms. Castillo's in-laws because Ms. Castillo believed she would be safer there since her father-in-law was in the military. (He recruited men for military service.) Ms. Castillo was afraid that the military would hurt Respondent because they knew how much Jeronimo loved her.

Ms. Castillo also claimed that she received 4 threatening, anonymous letters from 1990 to 1991. She received the first 2 type-written letters at her in laws. She received the third type-written letter at her parent's house, and she received the last hand-written letter at her own house. The letters said that they would kidnap Respondent if Ms. Castillo did not tell them where Jeronimo was. Ms. Castillo and her sons were never threatened in the letters, only Respondent. As a result, Ms. Castillo was especially concerned about Respondent's welfare. Ms. Castillo threw away the letters. Ms. Castillo was very scared when she received the letters, so she decided to leave Guatemala. She did not leave Guatemala until 1993

because she did not have any money to leave the country before then. In 1993, she left the country with her children and another group of people. When they crossed the border into Mexico, the Mexican Immigration Service caught them, stole all their money, and returned them to Guatemala.

After that incident, Ms. Castillo's husband worked in the United States and sent money to her. She tried to leave Guatemala again in 1994. Ms. Castillo left without her children, but she was very worried about her children. Her 2 boys remained with her parents, and Respondent remained with the in-laws. Ms. Castillo and her husband worked hard and saved money so that they could send for their children. Respondent sent for the boys first in 1996, but she did not have the money to send for Respondent. The in-laws told her that Respondent was doing well. A few months later, Ms. Castillo earned enough money to send for Respondent.

Jeronimo has had problems with mental illness. His problems began in 1996 when he traveled to the border to pick up Respondent. Apparently, Jeronimo was robbed and beaten in the head. Jeronimo would scream and cry. He began drinking in excess. He was always in a bad mood, and he beat Ms. Castillo even when he was not drunk. Jeronimo also beat the children. He went to the hospital 3 or 4 times, each time for 1 or 2 days. Jeronimo left the family in 2000 because Ms. Castillo filed a domestic violence charge against him. As a result, the Court ordered him to leave the family home. Not only did he choose to leave the home, but he deserted his family. Ms. Castillo has not heard anything from him, but she believed Jeronimo first traveled to Los Angeles. Ms. Castillo recently received a call from her mother-in-law telling her that Jeronimo returned to Guatemala. The mother-in-law questioned Ms. Castillo about Jeronimo's mental illness. Ms. Castillo sister-in-law told her that Jeronimo was afraid to be in Guatemala. Ms. Castillo believed her husband would be in danger in Guatemala because she believed the army and the guerrillas would look for him and try to kill him.

Ms. Castillo knew a man who was killed after deserting the army. The man had fled to Chiapas, Mexico, but he later returned to Guatemala. After he returned to Guatemala, he was killed. Apparently, Ms. Castillo has a photo of her husband with this man who was killed because he deserted the military.

Ms. Castillo claimed that her father-in-law was kidnapped by the guerrillas because he served in the Guatemalan military. He was eventually released. He still serves in the military.

Ms. Castillo believed that, if her daughter was forced to return to Guatemala, she would be harmed because Respondent's husband and father were deserters of the military. She also believes the Guatemalan military will believe that Respondent is a guerrilla because she left the country for a long time. Ms. Castillo does not believe that her in-laws could continue to protect Respondent if she returned to Guatemala because many people know Jeronimo, and they know Respondent is his daughter. She believes that people would recognize Respondent and kidnap or kill Respondent.

On cross examination, Ms. Castillo stated that she was married in 1981. Ms. Castillo stated that she has a United States work permit because she is on her husband's asylum application. Jeronimo was drafted by the Guatemalan military in 1983 at the age of 20, and he was in the military for 6 months. In his asylum application, Jeronimo stated that he was only in the military for 20 days. Ms. Castillo explained this by saying that Jeronimo was not provided with enough information and that his statement was false.

When the Service asked Ms. Castillo why she brought her 2 sons to the United States before she brought Respondent, she stated that her in-laws convinced her to leave Respondent behind because they could take good care of Respondent since her father-in-law was in the army, and as a result, the family had more protection.

Ms. Castillo stated that Jeronimo returned to Guatemala six months ago (the end of 2001) because he had legal problems in the United States. The last Ms. Castillo heard, Jeronimo had stayed in Guatemala for two months, and then he

went to Mexico to receive medical help and to flee from the Guatemalan military. While he was in Guatemala, Jeronimo was not threatened by the military. Ms. Castillo's sister-in-law told her that her mother-in-law wanted Ms. Castillo to return to be with her husband because he was very sick. Ms. Castillo told the sister-in-law there was nothing she could do for Jeronimo.

B. Testimony of Expert Witness, Dr. Linda Green, Assistant Professor, Department of Anthropology, University of Arizona

Dr. Linda Green is an Assistant Professor in the Department of Anthropology at the University of Arizona in Tucson, Arizona. She has taught theory and social culture anthropology, medical anthropology, and transnational migration for the past eight years. She graduated from the University of California at Berkeley, California, with a Ph.D. in Anthropology. Currently, she teaches a Ph.D. class at the University of Arizona on power and violence in Latin America with an emphasis on Guatemala. Her area of expertise, in which she wrote her dissertation and has performed numerous studies, is violence in Guatemala.

Dr. Green stated that every citizen in Guatemala age 18 and over is supposed to carry a cedula (national identity card) with them. She knew this because she accompanied many individuals to local municipality offices on numerous occasions to obtain cedulas, birth certificates, identity documents, etc. Dr. Green never saw a process in place whereby the provided information was verified. For example, the mother of a child born at home can register the child's birth without any evidence of the child's birth. The cedula was important during years of the civil war because people were often stopped and searched during that time. If the individual did not have their cedula with them, they could be fined and/or detained.

Respondent's representative claimed to show Dr. Green Exhibit 6, page 1, and he asked her if the statements in the document were true, if they would impact her assessment of the risk to Respondent's husband if he were returned to

Guatemala.[4] Dr. Green stated that Respondent's husband could be harmed if he was returned to Guatemala. She stated that there is a climate of revenge and murder in Guatemala that would put Respondent's husband in more jeopardy both random or intentional. She stated that the scenario Respondent's husband described is plausible. She stated that Respondent's husband was lucky that he was able to make the risky journey through Mexico to the Guatemalan municipality office in order to obtain his cedula without being recognized.

Dr. Greene said that there is a heightened sense of instability in Guatemala because there has been an increase in violence all over Guatemala. She said that Guatemala is in a human rights meltdown.

The information in Respondent's husband's addendum at Exhibit 9 changed her assessment of Respondent's risk of persecution in Guatemala. She believed that Respondent is at risk in Guatemala because of her relationship with her father and her husband. Originally, she thought Respondent had a 10-20% risk of being persecuted in Guatemala, but now she believes that risk is 20-30%. Dr. Greene said that if Respondent was caught without her cedula, she could face problems, including detention or a fine.

Dr. Greene believed that Respondent's grandparents remained safe in Guatemala because the grandfather had clout with the military having been an ex-military recruiter. She does not think that this factor would keep Respondent safe, especially if she was viewed as a subversive.

Dr. Greene said that Respondent will not be able to obtain a job in the formal sector without a cedula. She said that there is a great deal of trust within the Guatemalan civil system, and, as a result, cedulas are easy to obtain.

C. Testimony of Respondent

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[4] It is unclear what statements in Exhibit 6 Respondent's representative is referring to because there is no statement in this Exhibit made by Dr. Green or Respondent's husband. The Court assumes Respondent's representative is actually referring to Exhibit 9 where Respondent's husband admitted to perjurous testimony at his Individual Hearing.

Respondent testified to the following facts. She is 20 years of age and a native and citizen of Guatemala. Respondent is of mixed race. She left Guatemala in December 1996 when she was 15 years old. She has 2 brothers.

When Respondent was little, she heard gunshots and bombs. Respondent's family was very scared to leave the house and go to church. She remembered that, after her father deserted the military, the soldiers came into their house and destroyed everything in the house, including her favorite doll. They killed the family dog.

When Respondent lived with her grandparents, she went to school everyday and then came home to do her homework. She was not allowed to go outside. Respondent was escorted to and from school by her aunt who was a teacher at the school.

Respondent does not believe she could live with her grandparents if she returned to Guatemala because her grandfather has diabetes, and he is very sick. He has been in the hospital for some time. She does not think that her grandfather could protect her the same way he did in the past. Respondent does not have much contact with her grandparents because they do not have a telephone.

Respondent arrived in the United States on January 7, 1997. When she arrived at the United States border, smugglers helped her cross the border. After they crossed the border, the smugglers robbed the group and threatened to beat them. The smugglers stole anything of value from the group. Respondent went to an abandoned garage where she was supposed to meet her father. The father was supposed to pay the smuggler his fee. However, some thieves searched and beat her father. Then, the smugglers told them that the Immigration Officers were coming, and they abandoned the group.

Respondent testified that her husband has bad dreams about his military service and mood swings.

Respondent is the assistant manager at the Jack in the Box. She started working there in September 1997.

Respondent's mother and brothers reside together in Tucson, Arizona. She has numerous cousins and distant relatives throughout the United States.

Respondent does not want to return to Guatemala. She is afraid because she has a husband and a father who deserted from the military. She is also scared because she has a small child that she needs to take care of. She thinks it would be very difficult for her, and she does not think she will go back to Guatemala. She thinks the fact that she has lived in the United States for the past five years will make the Guatemalans suspicious of her because she has not contacted anyone nor gone back to Guatemala since she left. Respondent does not think that she could relocate to another area of Guatemala because it is a small country.

Respondent heard about recent murders in Guatemala from her aunt who spoke with another relative in California who told the aunt about what happened. Apparently, the person who was killed was a distant cousin. The man's body was found by a water press. He had been shot in the chest, raped, and hanged. Respondent was sad because they were close. Respondent also heard about a woman that was killed in a park close to Respondent's grandparents house. The woman had five small children. Respondent does not know how the two individuals were killed, but she thinks they were killed by the military.

On cross examination, Respondent admitted that she was never physically harmed in Guatemala. She admitted that she did not know who killed the aforementioned man and woman. She knew that Peace Accords were signed in Guatemala in December 1996, but she said that "things still happen" in Guatemala.

Respondent stated that her father went back to Guatemala in July or August 2001.

III. Standards for Timely Filing of Asylum Application

An applicant for asylum has the burden of proving by clear and convincing evidence that the application has been filed within one year after the date of the alien's arrival in the

United States. §208(a)(2)(B) of the Act; 8 C.F.R. § 208.4(a)(2)(A). The one year deadline shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. 8 C.F.R.§208.4(a)(2)(B)(ii). If the alien cannot meet this burden, he must prove to the satisfaction of the asylum officer, immigration judge, or Board of Immigration Appeals that he qualifies for an exception to the one year deadline. 8 C.F.R. § 208.4(a)(2)(B). An application for asylum will be considered if the alien demonstrates either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified. See § 208(a)(2)(D) of the Act.

Changed circumstances may include: changes in conditions in the applicant's country of nationality, or if the person is stateless, country of last habitual residence and changes in objective circumstances relating to the applicant in the United States. 8 C.F.R. § 208.4(a)(4)(i). If changed circumstances are found, the applicant shall apply for asylum within a reasonable time. See 8 C.F.R. §208.4(a)(4)(ii). Extraordinary circumstances, as contained in §208(a)(2)(D) of the Act, shall refer to events or factors beyond the alien's control that caused the failure to meet the one-year deadline. 8 C.F.R. §208.4(a)(5). Such circumstances shall include: serious illness or mental or physical disability of significant duration, legal disability, ineffective assistance of counsel, the fact that the applicant maintained temporary protected status until a reasonable period before the filing of the asylum application, and the fact that the applicant submitted an asylum application prior to the expiration of the deadline, but the application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period thereafter. Id. Such circumstances shall excuse the failure to file within the one-year deadline so long as the alien filed the application within a reasonable period given those circumstances. Id.

IV. Respondent's Asylum Application

A. The Asylum Application was Untimely Filed

Respondent arrived in the United States on, or about, January 7, 1997. Therefore, she must have filed her asylum application by January 7, 1998, for it to be considered timely filed. See 8 C.F.R. §208.4(a)(2)(B)(ii). Respondent was included as a dependent in her father's pending asylum application the week after she arrived in the United States; however, she married in 1999 before her father's asylum application was adjudicated. As a result of her 1999 marriage, she could no longer be considered a dependent in her father's asylum application because she lost the parent-child relationship to her father's application. Since she cannot meet the burden of demonstrating by clear and convincing evidence that her application was timely filed, she must prove to the Attorney General that she qualifies for an exception to the one year deadline by demonstrating either the existence of changed circumstances which materially affect her eligibility for asylum or extraordinary circumstances relating to the delay in filing. See § 208(a)(2)(D) of the Act, 8 C.F.R. §208.4(a)(2)(B).

B. The Untimely Filing was a Changed Circumstance

Respondent has demonstrated the existence of a change in objective circumstances relating to her in the United States. See §208(a)(2)(D) of the Act. She originally was included in her father's asylum application as a dependent within one year of her arrival in the United States. As a result, she met the one-year deadline. However, her marriage in 1999 resulted in her ineligibility to remain on her father's asylum application as a dependent because she lost the parent-child relationship with him. Respondent's marriage resulted in a change in circumstances, excusing her failure to apply for asylum within the one year filing deadline as long as she filed within a reasonable period of time following her marriage. Respondent filed her own independent asylum application several months after her marriage, and as a result, the Court finds that Respondent's asylum application was filed within a reasonable period of time following her 1999 marriage.

V. Standards for Asylum

An alien bears the evidentiary burdens of proof and persuasion in any application for withholding of removal under §241(b)(3)(A) of the Act. See Matter of Acosta, 19 I. & N. Dec. 211,214-215 (BIA 1985), modified, Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987); 8 C.F.R. §§208.13(a), 208.169b)(1998.).

To merit a discretionary grant of asylum under §208(a) of the Act, an alien must first demonstrate that he meets the definition of a refugee pursuant to §101(a)(42)(A) of the Act. A person qualifies as a refugee if he is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection" of his home country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §1101(a)(42)(A); See INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

The persecution may be caused by the government or by a non-governmental entity which the government is unable or unwilling to control. McMullen v. INS, 685 F.2d 1312, 1315, n. 2(9th Cir. 1981); Matter of Acosta, 19 I. & N. Dec. 222 (BIA 1985).

An alien may qualify' as a refugee if he has either suffered actual past persecution or if he possesses a well-founded fear of future persecution. 8 C.F.R. §208.13(b) (1998). Past persecution alone satisfies the requirement of §101(a)(42)(A) regardless of whether there is a well-founded fear of future persecution upon return to the alien's home country, unless a preponderance of the evidence establishes that circumstances in the alien's country of nationality or last habitual residence have changed since the persecution occurred. INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987); Matter Of Chen, 20 I. & N. Dec. (BIA 1989); 8 C.F.R. §208.13(b)(1)(I) (1998). A respondent for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution based on one of the five statutorily protected grounds. Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

The alien must demonstrate that the fear is objectively and subjectively well-founded. The alien's testimony may suffice to meet the burden of proof if it is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." Id. at 445. The objective component of "well-founded fear" may be satisfied through evidence about conditions in the respondent's home country, that country's system of justice, the respondent's experiences while living there, and the experiences of others. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The testimony will satisfy the objective test as long as the testimony is "credible, persuasive, and specific." Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987). Thus, to meet his or her burden of proof, the respondent must point to specific, objective facts that will support an inference of either past or future persecution. Matter of Chen, 20 I. & N. Dec. (BIA 1989).

Once an alien has established that he meets the statutory definition of a refugee under §101 (a)(42) of the Act, an Immigration Judge may exercise discretion and grant or deny asylum. The respondent has the burden of establishing that he merits a favorable exercise of discretion. Matter of Shirdel, 19 I. & N. Dec. 33 (BIA 1984). All factors, both favorable and adverse should be considered; however, in the absence of any adverse factors, asylum should be granted. Matter of Pula, 19 I. & N. Dec. 467, 474 (BIA 1989).

General background information about a country, where applicable, must be included in the record as a foundation for a respondent's claim of asylum and withholding of removal. Matter of S-M-J-, Int. Dec. 3303 (BIA 1997).

VI. Applicant's Application for Asylum

A. Past Persecution

Persecution has been defined as the threat to the life or freedom of an individual, or the infliction of suffering or harm upon others due to a belief or characteristic the oppressor seeks to overcome or punish in the victim. INS v. Cardoza-Fonsecau, 480 U.S. 421 (1987); Matter of Acosta, 19 I & N Dec. 222 (BIA 1985). In order to qualify as a refugee, such persecution

must be "on account of" one of the specified factors enumerated in the Act. The Court finds that Respondent has not met her burden of proving that he was persecuted in Guatemala on account of an imputed political opinion nor as part of a particular social group (family member of an individual who refused to serve in the military).

Respondent and her mother readily admit that she was never persecuted by the Guatemalan military or government. Respondent' mother claimed that she received four letters in 1990 and 1991. In some extreme cases, repeated and especially menacing death threats can constitute a primary part of a past persecution claim, particularly where those threats are combined with confrontation or other mistreatment. Lim v. INS, 224 F.3d 929 (9th Cir. 2000). Threats standing alone, however, constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual "suffering or harm." Sangha v. INS, 103 F.3d 1482, 1487 (9111 Cir. 1997); accord Boykov v. INS, 109 F.3d 413,416 (71h Cir. 1997) ("In the vast majority of cases ... mere threats will not, in and of themselves, compel a finding of past persecution."). Threats themselves are sometimes hollow and, while uniformly unpleasant, often do not effect significant actual suffering or harm. Furthermore, claims of threats are hard to disprove. A finding of past persecution raises a regulatory presumption of future persecution and flips the burden of proof to the INS to show that conditions have changed to such a degree that the inference is invalid. See Surinder Singh v. Ilchert, 69 F.3d 375,379 (9th Cir. 1995). Flipping the burden of proof every time an asylum applicant claimed that he had been threatened would unduly handcuff the INS.

The instant case is distinguishable from Lim v. INS, supra. First, Respondent never received death threats in the letter, nor were the threats she received combined with any type of confrontation or other mistreatment. In addition, it appears that the threats Respondent received, if any, were hollow. Apparently, the last letter Respondent's mother received was in 1991. She never received any letters after that date. During that

time, Respondent went to and from school everyday. The military could have easily confronted or harmed her at school, yet they never did. Respondent apparently lived in peace without any threats or any confrontations with the military from 1991 until she came to the United States in 1997 without. Although Respondent's mother said she was afraid for Respondent because Respondent was singled out in the letters, her behavior was not one of a mother who feared for her daughter's life. For example, after the mother left Guatemala in 1994, she did not send for Respondent until 1997. Furthermore, she sent for both of her sons (whom Respondent's mother claimed did not receive any threats in the anonymous letters) well before she sent for her daughter to immigrate to the United States, and Ms. Castillo even admitted that her in-laws believed Respondent was safe with them.

Based on the above analysis, Respondent has not met her burden of establishing past persecution.

B. Well-Founded Fear of Future Persecution

Since Respondent has not suffered past persecution, a presumption of a well-founded fear of future persecution is not established, and the burden does not shift to the Service either to attempt to prove that asylum or withholding of removal should be denied in the exercise of discretion by proving that the applicant would be safe in other parts of the country, or to attempt to rebut the presumption of future persecution by proving conditions have changed so much in the applicant's country that he or she no longer possesses a well-founded fear of future persecution. See 8 C.F.R. §208.139b)(1)(i), Matter of Chen, supra.

For a future fear of persecution to be well founded, it must be both subjectively genuine and objectively reasonable See INS v. Cardoza-Fonseca, 480 U.S. 421, 430-43 1, 107 S.Ct. 1207, 94 L.Ed. 2d 424(1987). To effect a well-founded fear, a threat need not be statistically more than fifty percent likely; the Supreme Court has suggested that even a one-tenth possibility of persecution might effect a well-founded fear. See id. at 430, 107 S.Ct. 1207. Respondent's expert witness stated that she believed Respondent risk of persecution was twenty to thirty

percent. While the Court has taken Dr. Green's opinion into consideration, it disagrees with her conclusion based on the facts in this case. In the instant case, a reasonable fact finder could not be compelled by the facts presented to conclude that Respondent's fear is objectively well-founded. Respondent was never confronted nor physically harmed. She was never threatened with death. She was never followed. She never appeared on any death lists, and she has presented no evidence of persons in a similar situation who received similar threats and were harmed or killed.

Furthermore, nearly all of Respondent's family is in Guatemala, and they live in relative safety. In fact, her own father returned to Guatemala last year on his own accord after he was arrested in the United States. Respondent has not presented any evidence that her father was threatened or harmed since his return to Guatemala even though her relationship to him is the fundamental basis of her claim. Furthermore, Respondent has neither claimed nor presented any evidence that either her father or her extended family in Guatemala were ever threatened or harmed by the Guatemalan government. The Ninth Circuit Court of Appeals has held that ongoing family safety mitigates a well-founded fear, particularly where the family is similarly situated to the applicant and thus presumably subject to similar risk. See Aruta v. INS, 80 F.3d 1389, 1395 (9th Cir.1996); Rodriguez-Rivera v. INS, 848 F.2d 998, 1006 (9th Cir.1988). The evidence here suggests that Respondent's father and family in Guatemala is similarly situated and subject to the similar risk. The record supports an inference that their safety ensures that Respondent will be safe.

Since Respondent's fear is not subjectively genuine and objectively reasonable, she has not proven a well-founded fear of future persecution. Since Respondent has not established past persecution nor a well-founded fear of future persecution, her asylum claim will be denied.

VII. Application for Withholding of Removal Pursuant to §241(b)(3) of the Act

An application for asylum is considered also under INA §241(b)(3), 8 U.S.C. §1251(b)(3) as a request for withholding of removal. Such withholding is a remedy required by Article 33 of the U.N. Convention Relating to the Status of Refugees, which binds the United States by virtue of our adherence to the U.N. Protocol on the same subject. The obligation incurred under the treaty, called *nonrefoulement,* forbids the expulsion or return of a refugee to a country where he or she would be persecuted. The Attorney General is forbidden, under the statute, to return any alien to a country where his or her "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion." Unlike asylum, withholding of removal is mandatory for qualified individuals. The remedy, however, does not preclude removal to a nonthreatening third country.

The standard for withholding is similar, but not identical, to the statutory definition of "refugee" for asylum purposes, which calls for a more subjective "well-founded fear of persecution." (See INS v. Cardoza-Fonseca, 480 U.S. 421). The Supreme Court has held that the standard to be applied for withholding is less generous. See INS v. Stevic. 467 U.S. 407. To be eligible for restriction on removal pursuant to §241(b)(3)(A) of the Act, the alien must show there is a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in particular social group, or political opinion. INS v. Stevic, 467 U.S. 407 (1984). This means that the alien must establish that it is more likely than not he would be subject to persecution for one of the grounds specified. Once eligibility for withholding of removal is proven, under §241(b)(3) of the Act, the Immigration Judge must grant such relief.

VIII. Respondent's Application for Withholding of Removal Pursuant to §241(b)(3) of the Act

In the instant case, Respondent does not merit a grant of asylum. As a result, the Court also finds that she fails to meet

the more stringent standard of a clear probability of persecution, as required for withholding of removal.

IX. Standards for Withholding of Removal Under the Convention Against Torture Pursuant to 8 C.F.R. §208.16(c)

A claim under CAT is triggered if the alien either: (1) requests consideration under CAT; or (2) presents evidence, including his testimony and information contained in Form I-589, which indicates that he may be tortured in the country of removal. 8 C.F.R. §208.13(c)(1).

> "Torture" is defined as
>
> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information, or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The United States Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N.Doc. A/39/51, Part I.A.1., at art. 1 (1984)(available on the U.N. website http://www.un.org/).

In considering an application for withholding of removal under CAT, the Immigration Judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. 8 C.F.R. §208.16(c)(4). The applicant, however, must establish a prima facie case that his removal must be withheld or deferred under 8 C.F.R. §§208.16(c) or 208.17(a). In an application for withholding of removal, the burden of proof is on the alien to establish that it is

more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. §208.1 6(c)(2).

"In assessing whether it is more likely than not that the applicant will be tortured if removed, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to (i) Evidence of past torture. . .; (ii) Evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured; (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (iv) Other relevant information regarding conditions in the country of removal." 8 C.F.R. §208.16(c)(3). If it is more likely than not that the alien will be tortured, then he or she is entitled to protection in the form of withholding or deferral of removal. See 8 C.F.R. §208.16(4). An alien shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under 8 C.F.R. §208.16(d)(2) or (d)(3). 8 C.F.R. §208.16(c)(4); see also § 241(b)(3)(B) of the Act. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. §208.16(d)(2).

X. Respondent's Application for Withholding of Removal Under the Convention Against Torture

The standard for withholding of removal under CAT is very similar, in considering an application for withholding of removal under CAT, the Immigration Judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. 8 C.F.R. §208.16(c)(4). The applicant, however, must establish a prima facie case that his removal must be withheld or deferred under 8 C.F.R. §§208.16(c) or 208.17(a). In an application for withholding of removal, the Judge must assess all evidence relevant to the possibility of future torture including, but not limited to (i) Evidence of past torture...; (ii) Evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured; (iii) Evidence of gross, flagrant or mass

violations of human rights within the country of removal, where applicable; and (iv) Other relevant information regarding conditions in the country of removal." 8 C.F.R. §208.16(c)(3).

The Court has already concluded that Respondent was not tortured in the past. Nor is there any reason for this Court to believe that she would be tortured in the future if she was returned to Guatemala. On the basis of the foregoing, the Court finds that Respondent has not met her burden of proof for CAT.

XI. Conclusion

Respondent has not met her burden of proof to merit relief in the forms of withholding of removal pursuant to §241(b)(3) of the Act and withholding of removal under CAT. Therefore, her application shall be denied. However, Respondent has demonstrated eligibility for the relief of voluntary departure, and such relief shall be granted.

Accordingly, the following orders shall be entered by the Court:

IT IS ORDERED that Respondent's application for Asylum under §208 of the Immigration and Nationality Act be **DENIED.**

IT IS FURTHER ORDERED that Respondent's Application for Withholding of Removal under §241(b)(3) of the Immigration and Nationality Act be **DENIED.**

IT IS FURTHER ORDERED that Respondent's request for relief under the Convention Against Torture pursuant to 8 C.F.R. §208.13(c)(l) be **DENIED.**

IT IS FURTHER ORDERED that, in lieu of an order of removal, Respondent be granted voluntary departure, pursuant to §240B(b) of the Act, without expense to the Government on or before September 15, 2002 or any extension beyond such date as may be granted by the District Director for the Immigration and Naturalization Service under such conditions as the District Director shall direct. The respondent must also post a $500.00 voluntary departure bond with the Service on or before July 23, 2002.

IT IS FURTHER ORDERED that if Respondent fails to depart as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the

following order shall thereupon become immediately effective: respondent shall be removed from the United States to Guatemala on the charge contained in the Notices to Appear.

[Signature]

Richard Knuck
United States Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) [circled] Personal Service (P)
To: [X] INS [ ] Alien [X] Alien's Attorney
Date: Jul 12 2002 **By:** Court Staff [initials: RK]

STATUTES AND REGULATIONS

8 U.S.C. § 1101(f)

For the purposes of this Act – No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was

[...] (6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

[...]

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. [...]

8 U.S.C. §1229c(b) At Conclusion of Proceedings

(1) In General

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that –

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a);

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4); and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

8 U.S.C. §1229c(f) Judicial Review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b), nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

8 U.S.C. §1158(a) Authority to Apply for Asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters, irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2)(B) Time limit

Subject to paragraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(2)(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 U.S.C. §1231(b)(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

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8 U.S.C. §1158(a)(3) Limitation on judicial review
No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

8 U.S.C. §1252(a)(2)(D)
Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 C.F.R. §208.4(a)(5)
The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:
(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;
(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;
(iii) Ineffective assistance of counsel, provided that:
(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and
(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;
(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;
(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned for corrections, and was refilled within a reasonable period thereafter; and
(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

FILED
MAR 3 0 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-740

In the Supreme Court of the United States

YUMAN LOPEZ-CANCINOS AND YOCARI CASTILLO DE LOPEZ, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review the conclusion of the Board of Immigration Appeals (BIA) that petitioner failed to demonstrate exceptional circumstances justifying his failure to file a timely application for asylum.

2. Whether the court of appeals had jurisdiction to review the conclusion of the BIA that petitioner was ineligible to seek voluntary departure because he had given false testimony for the purpose of obtaining an immigration benefit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Kungys v. *United States*, 485 U.S. 759 (1988) 12
Larita-Martinez v. *INS*, 220 F.3d 1092 (9th Cir. 2000) ... 8
Ramadan v. *Gonzales*:
427 F.3d 1218 (9th Cir. 2005), Opinion withdrawn on reh'g, No. 03-74351 2007 WL 528715, (9th Cir. Feb. 22, 2007) 6, 9
No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007) 10, 13
United States v. *Williams*, 504 U.S. 36 (1992) 9

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* ... 2
8 U.S.C. 1101(f)(6) (§ 101(f)(6)) 2, 5, 11
8 U.S.C. 1158(a)(2)(B) 2
8 U.S.C. 1158(a)(2)(D) 2, 10
8 U.S.C. 1158(a)(3) 2
8 U.S.C. 1229c(b)(1) 2, 11
8 U.S.C. 1229c(b)(1)(B) 2, 5
8 U.S.C. 1229c(f) 3, 12
8 U.S.C. 1231(b)(3) 5

Statutes and regulations—Continued: Page

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D) (Supp. V 2005)) 3, 6, 7, 8, 9, 12

8 C.F.R.:

Section 208.4(a)(5) 8

Section 1208.4(a)(5) 2, 5, 6, 7

Section 1208.4(a)(5)(i) 7

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-3a) is not published in the *Federal Reporter* but is reprinted in 186 Fed. Appx. 721. The decisions of the Board of Immigration Appeals (Pet. App. 6a-15a) and the immigration judge (Pet. App. 16a-33a, 34a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2006. A petition for rehearing was denied on August 25, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an application for asylum generally must be filed within one year of the date of an alien's arrival in the United States. 8 U.S.C. 1158(a)(2)(B). An application for asylum filed beyond the one-year period nonetheless may be considered "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within [one year]." 8 U.S.C. 1158(a)(2)(D). The pertinent regulations set forth that, for an alien to demonstrate "extraordinary circumstances" excusing the failure to file an application for asylum within the one-year period, the alien must "file[] the application within a reasonable period given those circumstances." 8 C.F.R. 1208.4(a)(5).

b. The INA provides that an alien may be granted voluntary departure in lieu of being removed at the close of removal proceedings. 8 U.S.C. 1229c(b)(1). To be eligible for voluntary departure, an alien must meet certain statutory conditions, including that the "alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure." 8 U.S.C. 1229c(b)(1)(B). The INA prescribes that "[n]o person shall be regarded as, or found to be, a person of good moral character who," *inter alia*, "has given false testimony for the purpose of obtaining any benefits under this chapter." 8 U.S.C. 1101(f)(6).

c. The INA generally forecloses judicial review of the "denial of a request for an order of voluntary depar-

ture." 8 U.S.C. 1229c(f). The INA also generally forecloses judicial review of "any determination of the Attorney General" concerning whether an alien has demonstrated "to the satisfaction of the Attorney General * * * the existence of * * * extraordinary circumstances relating to the delay in filing an application" for asylum within the one-year period. 8 U.S.C. 1158(a)(2)(D) and (3). Those limitations, however, do not preclude judicial review "of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

2. Petitioner Lopez-Cancinos, a native of Guatemala, entered the United States illegally in May 1997.[1] In October 2000, petitioner filed an application for asylum. Petitioner was subsequently charged with being removable as an alien present in the United States without being admitted or paroled. Pet. App. 17a, 20a.

a. In his removal proceedings, petitioner conceded removability but sought, *inter alia*, asylum and voluntary departure. With respect to his application for asy-

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[1] Petitioner Castillo de Lopez is the wife of petitioner Lopez-Cancinos. She filed a claim for asylum on her own behalf. The immigration judge denied her asylum claim but granted her voluntary departure. Pet. App. 34a-55a. The Board of Immigration Appeals sustained the immigration judge's decision regarding Castillo de Lopez, *id.* at 7a, 13a-15a, and the court of appeals affirmed, *id.* at 3a. The questions presented in the certiorari petition pertain only to the claims of her husband, Lopez-Cancinos. See Pet. i, 13, 14, 22-24 & n.8. Castillo de Lopez's interest in the petition apparently is a request for a derivative grant of asylum or withholding of removal if her husband is awarded relief. Accordingly, references to "petitioner" in this brief are to petitioner Lopez-Cancinos.

..., petitioner argued that extraordinary circumstances excused his failure to seek asylum within one year of arriving in the United States. In particular, petitioner contended that he had relied on an individual who presented himself as an attorney to file an application for asylum on petitioner's behalf, but that an application was never in fact filed. Petitioner claimed that he learned that an application had not been filed only after the one-year period had elapsed, and that he subsequently filed an application. Pet. App. 24a-25a. Petitioner also argued that he suffered from post-traumatic stress disorder resulting from persecution that he had suffered in Guatemala based on suspicions that he was an anti-government guerilla, and that his disorder contributed to the delay in his seeking asylum. *Id.* at 10a-11a, 22a-24a.

During the hearing, petitioner testified falsely that he had not returned to Guatemala since his arrival in the United States. Pet. App. 8a. Several months after the hearing, petitioner submitted an affidavit to the immigration judge (IJ) admitting that he had given false testimony at his removal hearing, and that he had in fact returned to Guatemala to obtain an identification document. *Id.* at 26a. Petitioner stated that he had given false testimony at the hearing because he was concerned that no one would believe that he would return to Guatemala in light of his contention—related to his claim for asylum—that he feared persecution in Guatemala. *Id.* at 26a-27a; see *id.* at 8a.

b. The IJ denied petitioner's applications for asylum and voluntary departure. Pet. App. 33a. The IJ concluded that petitioner had failed to demonstrate extraordinary circumstances excusing his failure to file an asylum application within one year of his arrival in the

United States. *Id.* at 29a. The IJ explained that petitioner was required by the applicable regulations to file his application within a "reasonable period" of becoming aware that the individual who presented himself as an attorney had failed to file an asylum application on petitioner's behalf. *Ibid.*; see 8 C.F.R. 1208.4(a)(5). The IJ determined that petitioner had failed to satisfy that standard, explaining that petitioner "was aware that there was a problem with his asylum application in 1998," but that he nonetheless failed to file an application or hire a new attorney until 2000. Pet. App. 29a. The IJ rejected petitioner's application for withholding of removal under 8 U.S.C. 1231(b)(3) on the merits, concluding that he had not carried his burden of demonstrating that it was more likely than not that he would suffer persecution if he was returned to Guatemala. *Id.* at 32a.

The IJ also denied petitioner's application for voluntary departure. Pet. App. 32a. The IJ observed that petitioner had given false testimony concerning whether he had returned to Guatemala, and that his "stated purpose for committing this perjury was the fact that he thought it would be detrimental to his asylum claim if the Court knew he had returned to Guatemala a few months after his first entry into the United States." *Ibid.* In that light, the IJ concluded, petitioner had given false testimony for the purpose of obtaining a benefit under the INA, and petitioner therefore could not establish eligibility for voluntary departure as a person of good moral character. *Ibid.*; see 8 U.S.C. 1101(f)(6), 1229c(b)(1)(B).

c. The Board of Immigration Appeals (BIA) affirmed in relevant part. Pet. App. 6a-15a. The BIA held that petitioner failed to demonstrate extraordinary circum-

stances excusing his failure to seek asylum within the one-year period. The BIA explained that, "[a]lthough [petitioner's] misplaced trust in an apparently dishonest attorney or imposter * * * may be an 'extraordinary circumstance[],'" petitioner had "waited 2 years after discovering the fraud before he properly filed an asylum application." *Id.* at 7a-8a. "Given this delay," the BIA determined, petitioner "did not hasten to file an asylum application within a 'reasonable period' after discovering the fraud." *Id.* at 8a (quoting 8 C.F.R. 1208.4(a)(5)). The BIA affirmed the IJ's denial of petitioner's related request for withholding of removal, finding that the harms he had suffered in the past did not rise to the level of "persecution," and that in any event there was sufficient evidence of a fundamental change in circumstances in Guatemala to rebut any presumption of future persecution in Guatemala that would arise from a finding of past persecution. *Id.* at 11a-12a.

The BIA also affirmed the IJ's denial of voluntary departure. The BIA agreed with the IJ that petitioner is ineligible for voluntary departure because he "has given false testimony for a benefit under the Act and therefore cannot establish good moral character." Pet. App. 12a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 2a-3a. The court concluded that it lacked jurisdiction to review the denial of petitioner's claims for asylum and voluntary departure, explaining that the petition for review "raises no cognizable constitutional claims or questions of law." *Id.* at 3a (citing 8 U.S.C. 1252(a)(2)(D) and *Ramadan* v. *Gonzales*, 427 F.3d 1218, 1221 (9th Cir. 2005), opinion withdrawn on reh'g, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007)). But the court affirmed on the merits the

BIA's rejection of petitioner's request for withholding of removal on the ground that substantial evidence supported the conclusion that changed country conditions in Guatemala rebutted any presumption that he would be persecuted in that country. *Id.* at 3a. Petitioner does not seek review of the latter ruling in this Court.

ARGUMENT

The unpublished order of the court of appeals does not warrant review by this Court.

1. a. Petitioner contends (Pet. 22-23) that the court of appeals had jurisdiction to review his contention that his post-traumatic stress disorder presented an extraordinary circumstance excusing his delay in filing an asylum application. See 8 C.F.R. 1208.4(a)(5)(i). The BIA held that petitioner failed to establish extraordinary circumstances because he failed to file his asylum application within a "reasonable period" after discovering that the individual who petitioner believed was an attorney had failed to file an asylum application on petitioner's behalf. Pet. App. 7a-8a; see 8 C.F.R. 1208.4(a)(5). The court of appeals concluded that it lacked jurisdiction to review the denial of petitioner's claim for asylum, explaining that petitioner had failed to raise any "cognizable constitutional claims or questions of law." Pet. App. 3a; see REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)).

Petitioner argues (Pet. 22) that the IJ and BIA were required to consider his contention that his post-traumatic stress disorder was an extraordinary circumstance contributing to the delay in filing an asylum application; that the IJ and BIA failed to consider that claim; and that the IJ's and BIA's failure to consider that claim raised a "question[] of law" for purposes of

judicial review in the court of appeals under REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). Petitioner's argument lacks merit and does not warrant review.

Petitioner does not identify or explain the "question of law" that, in his view, was raised by the agency's alleged failure to consider his claim concerning post-traumatic stress disorder. The normal presumption, in any event, is that an agency has considered all relevant evidence in the record. See, *e.g.*, *Larita-Martinez* v. *INS*, 220 F.3d 1092, 1095 (9th Cir. 2000). Petitioner identifies no reason that the normal presumption should not apply in this case, including with respect to his claim that post-traumatic stress disorder contributed to his delay in seeking asylum. Indeed, the IJ extensively reviewed the evidence in the record that petitioner suffered from post-traumatic stress disorder. Pet. App. 17a-19a. Moreover, the IJ observed that "extraordinary circumstances" justifying a failure to file an asylum application within the one-year period include "serious illness or mental or physical disability of significant duration," and that "[s]uch circumstances shall excuse the failure to file within the one-year deadline so long as the alien filed the application within a reasonable period given those circumstances." Pet. App. 28a (citing 8 C.F.R. 208.4(a)(5)).

Accordingly, the IJ and BIA are presumed to have considered petitioner's claim that his mental condition contributed to his delay in seeking asylum, even if the IJ and BIA did not separately set forth an explicit statement to that effect in the course of explaining their conclusion that petitioner had failed to file his asylum application within a reasonable period. There thus is no warrant for reviewing petitioner's claim that the IJ and BIA

failed to consider his contention and that their failure to do so raised a "question of law" for purposes of judicial review.[2]

b. In concluding that it lacked jurisdiction to review the agency's denial of petitioner's application for asylum on grounds of untimeliness, the court of appeals cited its decision in *Ramadan* v. *Gonzales*, 427 F.3d 1218, 1221 (9th Cir. 2005), opinion withdrawn on reh'g, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007). See Pet. App. 3a. At the time of the court of appeals' opinion in this case, the Ninth Circuit had issued its initial decision in *Ramadan*, which held that the phrase "questions of law" for purposes of judicial review under REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)) refers to claims "regarding statutory construction." *Ramadan*, 427 F.3d at 1222. The Ninth Circuit had thus held that the phrase "questions of law" did not encompass the issue of whether an alien demonstrated "changed circumstances" so as to excuse the failure to timely file an application with one year of arriving in the United States. *Ibid.* The Ninth Circuit subsequently granted a petition for rehearing in

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[2] In the court of appeals, moreover, petitioner did not specifically argue that the alleged failure of the IJ and BIA to consider his contention concerning post-traumatic stress disorder raised a "question[] of law" within the meaning of REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). Rather, petitioner argued that the alleged failure of the IJ and BIA to consider his contention amounted to a violation of his due process rights and that he therefore raised a reviewable "constitutional claim[]" within the meaning of REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). See Pet. C.A. Br. 27-34. Petitioner does not raise the latter issue in this Court. See Pet. 22-23 n.8. The precise issue now raised by petitioner therefore was not pressed in the court of appeals, which further counsels against granting review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Ramadan, and upon rehearing, issued a new opinion concluding that the term "questions of law" "extends to questions involving the application of statutes or regulations to undisputed facts." *Ramadan*, 2007 WL 528715, at *3. The court thus held, contrary to its initial opinion in the case, that it had jurisdiction to review whether the undisputed facts amounted to "changed circumstances." *Id.* at *3, *8-*9.[3]

Although the court of appeals below relied on the court's initial opinion in *Ramadan* in concluding that it lacked jurisdiction to review the denial of petitioner's application for asylum, and although the court of appeals subsequently revised its opinion in *Ramadan*, there appears to be no reason to grant the petition, vacate the judgment below, and remand the case to permit the court of appeals to consider petitioner's contention under the court's revised decision in *Ramadan*. By the time petitioner moved for rehearing and rehearing en banc below, the court of appeals had already granted rehearing in *Ramadan*; indeed, petitioner's petition for rehearing below specifically noted that the court of appeals had granted rehearing in *Ramadan*. See Pet. for Reh'g 1 & n.1. The court of appeals nonetheless denied rehearing in petitioner's case without holding the case

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[3] The court rejected the government's argument that the existence of "changed circumstances" is a determination within the discretion of the Attorney General and therefore does not present a question of law for purposes of judicial review. See 8 U.S.C. 1158(a)(2)(D) (requiring alien to "demonstrate[] *to the satisfaction of the Attorney General* * * * the existence of changed circumstances which materially affect the applicant's eligibility for asylum") (emphasis added). The government is currently considering whether to seek further review in *Ramadan* in this Court.

for resolution of the proceedings on rehearing in *Ramadan*.

Accordingly, the court of appeals presumably determined that its conclusion that it lacked jurisdiction to review the denial of petitioner's application for asylum would be unaffected by the court's grant of rehearing in *Ramadan* or by the ultimate resolution of that case on rehearing. And this case would not in any event be an appropriate one in which to consider the issue, for the reasons stated above. If, however, this Court nonetheless concludes that the court of appeals should explicitly consider whether its revised approach in *Ramadan* would bear on that court's resolution of this case, this Court may wish to consider granting the petition, vacating the judgment below, and remanding the case to the court of appeals to permit the court to undertake that inquiry.

2. Petitioner contends (Pet. 23) that the court of appeals had jurisdiction to review the conclusion of the BIA that he is ineligible to receive voluntary departure. That claim lacks merit and does not warrant review.

The BIA determined that petitioner's false statement concerning whether he had returned to Guatemala rendered him ineligible for voluntary departure. See Pet. App. 12a. In particular, the BIA held that the false statement was made "for the purpose of obtaining [a] benefit[] under this chapter," 8 U.S.C. 1101(f)(6), and that petitioner thus could not demonstrate good moral character for purposes of establishing his eligibility for voluntary departure, see 8 U.S.C. 1229c(b)(1). Petitioner argued in the court of appeals that his false statement had not been made for the purpose of obtaining a benefit under the Act, but instead had been made "to avoid wrongful denial of a benefit," *i.e.*, asylum. Pet.

C.A. Br. 58; see *id.* at 13 ("He thought that if he told people of his foray back into Guatemala, they would discredit his entire claim [for asylum].").

The question whether petitioner's false statement was made for the purpose of obtaining an immigration benefit is not a "question[] of law" for purposes of judicial review under REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). As this Court has explained, the question whether an alien made a false statement for the purpose of obtaining immigration benefits entails assessment of whether the alien acted with "the subjective intent of thereby obtaining immigration or naturalization benefits," which constitutes a "question of fact" rather than a "question of law." *Kungys* v. *United States*, 485 U.S. 759, 782 (1988). Moreover, petitioner, by his own admission, made the false statement because of a concern that a truthful answer would have adversely affected his claim for asylum. See Pet. App. 32a ("His stated purpose for committing this perjury was the fact that he thought it would be detrimental to his asylum claim if the Court knew that he had returned to Guatemala a few months after his first entry into the United States."). In that context, the court of appeals correctly concluded that it lacked jurisdiction to review the BIA's conclusion that petitioner is ineligible for voluntary departure. See 8 U.S.C. 1229c(f). Petitioner identifies no court of appeals that has reached a contrary conclusion in comparable circumstances.[4]

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[4] There is no warrant for reviewing petitioner's abstract arguments (Pet. 16-22) on the scope of the phrase "questions of law" in REAL ID Act § 106(a)(1)(A)(iii) (to be codified at 8 U.S.C. 1252(a)(2)(D)). Whatever may be the scope of that phrase in the abstract, the specific questions raised by the petition concern the court of appeals' conclusion that it lacked jurisdiction to review the denial of petitioner's applica-

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to consider granting the petition, vacating the judgment of the court of appeals, and remanding the case to permit the court of appeals to consider whether the court, under its revised decision on rehearing in *Ramadan* v. *Gonzales*, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007), has jurisdiction to review petitioner's claim that the BIA erred in denying his asylum application on grounds of untimeliness.

Respectfully submitted.

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tions for asylum and voluntary departure. See Pet. 22-23. Those issues, for the reasons explained, do not merit this Court's review.

(2)

No. 06-740

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YUMAN LOPEZ-CANCINOS, and
YOCARI CASTILLO DE LOPEZ,

Petitioners,

—v.—

ALBERTO R. GONZALES,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

SUMMARY OF ARGUMENT..... 1

BACKGROUND AND INTERVENING PRECEDENT..... 1

GVR IS APPROPRIATE IN THIS CASE..... 3

Reconsideration of this Case in Light of *Ramadan II* Will Likely Result in a Different Outcome With Respect to the Issue of the Federal Court's Jurisdiction..... 4

The Argument That The Ninth Circuit Should Not Have the Opportunity to Reconsider Its Decision Below Because it Must Have Anticipated the *Ramadan II* Holding When It Decided this Case Amounts to Unwarranted Speculation 5

GVR is Warranted Here Given the Absence of Factors Cautioning Against Its Use and The Strong Equities in Favor of Allowing the Ninth Circuit To Address the Legal Questions Raised in This Case..... 6

CONCLUSION..... 8

TABLE OF AUTHORITIES

CASES:

Lawrence v. Chater, 516 U.S. 163 (1996) 3, 4, 6, 7

Ramadan v. Gonzales, __ F. 3d __, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007).....1, 2,3, 4, 5, 8

Ramadan v.Gonzales, 427 F.3d 1218 (9th Cir. 2005), opinion withdrawn on rehearing, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007) 1, 2, 5

Stutson v. United States, 516 U.S. 193 (1996)..... 7

STATUTES:

8 U.S.C. §1101 et. seq..... 1

8 U.S.C. §1101(f)(6)..... 2

8 U.S.C. §1158(a)(2)(D)..... 2

8 U.S.C. §1229c(b)..... 2

8 U.S.C. §1252D..... 1

28 U.S.C. §2106..... 3

FEDERAL REGULATIONS:

8 C.F.R. §208.4(a)(5)(i) 2

8 C.F.R. §208.13(b)(1)(iii)..... 7

SUMMARY OF ARGUMENT

In light of the Ninth Circuit's recent decision in *Ramadan v. Gonzales*, __ F. 3d __, No. 03-74351, 2007 WL 528715 (9th Cir. Feb. 22, 2007) (*"Ramadan II"*), reversing its interpretation of law in the very case cited below as the basis for denying the petition for review, this Court should issue an order granting *certiorari*, vacating the decision below, and remanding the case ("GVR") for further review. This case meets the criteria for GVR in that the lower court's decision rests on a legal proposition that the same court has since rejected, and review of this case by that court in light of its new precedent is therefore likely to affect the ultimate outcome of the case. The government's speculation that the panel below must have accurately predicted the *Ramadan* panel's decision at the time it denied the petition for rehearing in this case is unwarranted. Moreover, given that the decision in *Ramadan II* regarding the scope of federal court jurisdiction cannot be reconciled with the decision below, the government's claim that the focus of Petitioner's arguments regarding jurisdiction differ from those set forth in the Petition for Writ of Certiorari are beside the point: in light of intervening precedent, the Court's exercise of its GVR power here is the fairest, most expedient, and most appropriate manner in which to resolve this case.

BACKGROUND AND INTERVENING PRECEDENT

As set forth more fully in the Petition for Writ of Certiorari, this case raises the issue of the meaning of the term "questions of law" in 8 U.S.C. §1252(D), which provides that, notwithstanding other jurisdictional bars set forth in the Immigration and Nationality Act, 8 U.S.C. §1101 et seq., federal courts retain jurisdiction over "questions of law." In *Ramadan v. Gonzales*, 427 F. 3d 1218, 1222 (9th Cir. 2005) (*"Ramadan I"*), opinion withdrawn on rehearing in *Ramadan II*, the Ninth Circuit had held that the phrase

"questions of law" "refer[red] to a narrow category of issues regarding statutory construction." In its decision in the case at bar, the circuit court cited only *Ramadan I* and the jurisdictional provision itself in support of its finding that it lacked jurisdiction to review Mr. Lopez-Cancinos' applications for asylum and voluntary departure. *Petition for Writ of Certiorari,* Appendix, p. 3a. Based on its holding in *Ramadan I,* the Ninth Circuit found that it lacked jurisdiction to consider 1) the argument that Mr. Lopez-Cancinos' mental health disorder compromised his ability to comply with the one-year filing deadline, and qualified him for an exception to the deadline under 8 U.S.C. § 1158 (a)(2)(D) (exception based on changed or extraordinary circumstances) and 8 C.F.R. § 208.4(a)(5)(i) (extraordinary circumstances include serious mental disability); and 2) the argument that certain false statements Mr. Lopez-Cancinos had made did not constitute "false testimony for the purpose of obtaining," immigration benefits, *see* 8 U.S.C. §1101(f)(6) (such testimony bars a finding of "good moral character"), and thus did not bar him from eligibility for voluntary departure under 8 U.S.C. §1229c(b).

The Petition for Writ of Certiorari in this case was filed on November 21, 2006. On February 22, 2007, following rehearing in *Ramadan,* the Ninth Circuit withdrew its original opinion and issued a new one. *Ramadan v. Gonzales,* 2007 WL 528715 (9th Cir.) (*"Ramadan II"*). In so doing, the court modified its interpretation of the term "questions of law" to include the application of statutes or regulations to undisputed facts. It stated:

> By implying a fixed dichotomy between fact and law, our brief initial opinion inadvertently failed to consider an important category of cases – those that raise mixed questions of law and fact.

Id., 2007 WL 528715, *1. The court held that Ramadan's claim that the facts in her case established "changed circumstances" so as to qualify her for an exception to the one-year asylum application filing deadline constituted a question of law over which it had jurisdiction.

GVR IS APPROPRIATE IN THIS CASE

Granting certiorari, vacating, and remanding this case is appropriate because of the likelihood that the intervening circuit court precedent, once considered by the court below, would change the outcome of the litigation, and because the factors cautioning against GVR in certain cases are absent here. Title 28 U.S.C. § 2106 confers broad powers on the Supreme Court to vacate any judgment lawfully before it for review and to remand the cause for such action as may be fair under the circumstances. *Lawrence v. Chater,* 516 U.S. 163, 166 (1996).[1] This Court has stated:

> Where intervening developments [...] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR

[1] The statute reads, in full, "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. §2106.

> order is ultimately appropriate depends further on the equities of the case.

Id. at 167-68. As shown below, the "reasonable probability" of a different outcome and the equities in this case align to render a GVR the most appropriate resolution. The government's arguments against GVR amount to unwarranted speculation and fail to address the Court's criteria for GVR orders.

Reconsideration of this Case in Light of *Ramadan II* Will Likely Result in a Different Outcome With Respect to the Issue of the Federal Court's Jurisdiction.

First, there is a reasonable probability of a different outcome in light of the recent decision in *Ramadan II*. In that case, the court found that it had jurisdiction to review the applicant's claim that her public expression of political opinions since her arrival in the U.S. from Egypt constituted changed circumstances materially affecting her eligibility for asylum, so as to qualify her for an exception to the one-year filing deadline. *Ramadan II*, 2007 WL 528715 (9th Cir.) at *2-3. There is no readily apparent material distinction between the nature of that claim and the Petitioners' claim here that the effect of Mr. Lopez-Cancinos' mental disorder on his ability to timely file for asylum constitutes an extraordinary circumstance relating to his filing delay. Indeed, the government, in it brief, offers none. There is thus every reason to believe that, applying its new interpretation of law to the facts of this case, the Ninth Circuit would likewise find that it had jurisdiction to review Mr. Lopez-Cancinos' claim to asylum eligibility.

The Argument That The Ninth Circuit Should Not Have the Opportunity to Reconsider Its Decision Below Because it Must Have Anticipated the *Ramadan II* Holding When it Decided this Case Amounts to Unwarranted Speculation.

The government's argument against a GVR order amounts to unwarranted speculation as to the Ninth Circuit's reasoning in denying the petition for rehearing below. The government argues that because the Ninth Circuit had granted the petition for rehearing in *Ramadan I* at the time it denied the petition for rehearing in this case, the court "presumably determined that its conclusion that it lacked jurisdiction to review the denial of petitioner's application for asylum would be unaffected by the court's grant of rehearing in *Ramadan* or by the ultimate resolution on that case on rehearing." *Brief for the Respondent in Opposition* ("*Opposition Brief*"), p. 11. Yet the order denying the petition for rehearing is silent as to the court's reasoning. *Petition for Writ of Certiorari*, App. 1a. In addition, not only was *Ramadan II* not decided until six months after the denial of the petition for rehearing below, but, as the government emphasizes, Petitioners had argued before the panel that the agency's failure to consider the mental health/exception circumstances argument amounted to a due process violation, the review of which clearly falls within the federal courts' jurisdiction. *Opposition Brief*, p. 9, n. 2. There is therefore no reason to believe that the court gave the issue of its jurisdiction over mixed questions of law and fact full, or even cursory, consideration in this case. One can only speculate as to what resolution the panel expected in *Ramadan II*, and such speculation would be unwarranted.[2] Ultimately, a court

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[2] Again, the argument against a presumption that the panel anticipated the holding in *Ramadan II* when it denied the petition for reconsideration here is strengthened by the fact that there is no readily apparent distinction between the "changed circumstances"

cannot be presumed to have anticipated and considered an opinion it had not yet rendered.

The equities also warrant GVR here. This Court has stated that, in an appropriate case, a GVR order not only "conserves the scarce resources [...] that might otherwise be expended on plenary consideration," and "assists the court below by flagging a particular issue that it does not appear to have fully considered," but it also "alleviates the '[p]otential for unequal treatment' that is inherent in [the Supreme Court's] ability to grant plenary review of all pending cases raising similar issues." *Lawrence v. Chater,* 516 U.S. at 606-607 (internal citations omitted). Not only is it clear in this case that the Ninth Circuit did not consider the question of its jurisdiction over the application of the law to undisputed facts, but the need to alleviate the potential for unequal treatment could hardly be greater than in a case where the same legal issue that was resolved in a lower court against a petitioner before this Court has since been resolved in favor of another petitioner by the same lower court.

GVR is Warranted Here Given the Absence of Factors Cautioning Against Its Use and The Strong Equities In Favor of Allowing the Ninth Circuit to Address the Legal Questions Raised in This Case.

The factors cautioning against a GVR order in certain cases are absent in this one. Indeed, the government concedes that if this Court "concludes that the court of appeals should explicitly consider whether its revised approach in *Ramadan* would bear on that court's resolution of this case, this Court may wish to consider" GVR "to permit the court to undertake that inquiry." *Opposition Brief,* p. 11. The parties thus agree

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question raised in that case and the "exceptional circumstances" question raised here.

that there is no downside to providing the Ninth Circuit with this opportunity. The equities also counsel in favor of such an action.

This is not a case in which the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court. *See Lawrence v. Chater,* 516 U.S. 168 (1996) (GVR is unwarranted under such circumstances).[3] Here, the potential benefits to the Petitioners clearly justify a delay to enable the Ninth Circuit to apply its own precedent to the case because a finding of jurisdiction over the filing deadline issue could lead to an adjudication of Mr. Lopez-Cancinos' asylum claim on the merits.[4] This Court's solicitude for the rights of criminal defendants in light of the government's coercive power to imprison, *see Stutson v. United States,* 516 U.S. 193, 196 (1996), and its inclination to issue GVR orders in light of intervening developments in criminal cases counsel in favor of the same approach where the governmental power involved is the power to remove an individual from the country to one where he claims he will face persecution (and in this case, possibly death). Because he was deemed ineligible for asylum, and because that determination was deemed unreviewable before *Ramadan II,* no federal court has ever considered Mr. Lopez-Cancinos' claims that he has a well-founded fear of persecution, or that, in light of his past persecution, he is entitled to asylum on humanitarian grounds. *See* 8 C.F.R. § 208.13(b)(1)(iii) (eligibility for victims of past persecution based on the severity of the

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[3] The Court in *Lawrence v. Chater* also set forth another factor counseling against GVR: whether the intervening development is a confession of error that is part of an unfair or manipulative litigation strategy. That factor is not at issue here.

[4] Ms. Castillo de Lopez would also benefit as a derivative asylum applicant.

persecution or the possibility of other serious harm). The equities therefore weigh in favor of a GVR in this case.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*, vacate the decision below, and remand the case for consideration in light of the recent decision in *Ramadan v. Gonzales.*

Respectfully Submitted,

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